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Supreme Court of the United States

OCTOBER TERM, 1967

No. 564

DAVID ARTHUR GEAREY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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DAVID ARTHUR GEAREY,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 3, 1967, and the prior judgment of such Court in the same case entered on October 21, 1966.

Citations to Opinions Below

There are two opinions by the Court of Appeals, and two opinions by the United States District Court for the Southern District of New York, both by Hon. Thomas F. Murphy, Jr., United States District Judge. Judge Murphy's first opinion, finding the petitioner guilty, is printed in the Appendix, *infra,* p. 39*, and is reported at 260 F. Supp. 7 (1966). The Court of Appeals' first opinion, which

* References to material printed in the Appendix will appear as "Appendix, *infra,* p. ——."

vacated the conviction and remanded, is printed in the Appendix, *infra,* p. 23, and is reported at 368 F. 2d 144 (1966). Judge Murphy's second opinion, which reinstated the conviction, is printed in the Appendix, *infra,* p. 17, and is reported at 266 F. Supp. 161 (1967). The Court of Appeals' second opinion, affirming such conviction, is printed in the Appendix, *infra,* p. 1, and is unreported.

Jurisdiction

The judgment of the United States Court of Appeals was entered on July 3, 1967. On August 4, 1967, Mr. Justice Fortas issued an order extending the time in which to file this petition for a writ of certiorari up to and including September 1, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented for Review

1. Whether a conscientious objector claimant whose views do not mature until after an order to report for induction can be denied statutory rights available to all other conscientious objector claimants.

2. Whether the presentation to a local Selective Service board of a non-frivolous claim for reopening and consideration of a new Selective Service classification requires the local board to reopen such classification.

3. Whether the narrow standard of judicial review generally applicable to Selective Service classifications is posited on the availability of elaborate administrative re-

view, and consequently should not be applicable in a case where petitioner received no administrative review.

4. Whether petitioner's Selective Service local board's denial of his application for classification as a conscientious objector, submitted after he received an order to report for induction, is without any rational basis in fact

(a) because it is clear from the record that the denial was based solely or exclusively on (i) its lateness; and/or (ii) petitioner's stated readiness to use force in defense of his loved ones; or

(b) because the local board's legally erroneous belief that petitioner was not entitled to conscientious objector classification on grounds of his readiness to use force in defense of his loved ones, so contaminated the record, that the conviction cannot stand even if there are otherwise sufficient grounds for approving the denial of the claim.

5. Whether petitioner was denied procedural due process at the remanded hearing ordered by the Court of Appeals because

(a) he was denied the right to testify in his own behalf and to present documentary evidence; and

(b) the Government's entire case consisted of answers elicited from Local Board members to a series of prejudicial leading, conclusory questions.

Constitutional, Statutory and Regulatory Provisions Involved

This case involves the due process clause of the Fifth Amendment and the religious liberty clause of the First Amendment.

The statute involved is Section 6(j) of the Universal Military Training and Service Act of 1950, as amended, 50 U. S. C. App. §456(j), which, at all times pertinent* to this case, read as follows:

> "(j) Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of

* The Military Selective Service Act of 1967, effective July 1, 1967, made certain amendments to Section 6(j) not relevant to this case.

such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who

knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

A number of Selective Service Regulations which were in effect at all times pertinent to this case are also involved. They are 32 CFR §1625.2, 32 CFR §1625.4, 32 CFR §1625.11, 32 CFR §1625.12, 32 CFR §1625.13, 32 CFR §1625.14, and 32 CFR §1626.25,[1] all of which are printed in the Appendix, *infra*, pp. 53-58.

Statement of the Case

Petitioner refused to submit to induction into the Armed Forces in New York, New York on July 8, 1965. His defense is that he was and is a conscientious objector, as de-

[1] Rescinded by E. O. 11360, June 30, 1967. The other regulations are still in effect.

fined in the statute, and that his Local Selective Service Board had improperly and unlawfully refused to so classify him. He was indicted, tried without a jury, found guilty, and sentenced to two years' imprisonment, in the United States District Court for the Southern District of New York. 260 F. Supp. 7; App., *infra*, p. 21.

The unique factor in this case, which led to its being heard twice in the District Court and in the Court of Appeals,[2] is that petitioner claimed that his conscientious objector views did not mature until after he received an order to report for induction.[3] Under the Universal Military Training and Service Act of 1950, then in effect,[4] all

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[2] References to the trial minutes will be "Tr. ___a" referring to Appellant's Appendix in the Court of Appeals in the first appeal. References to the minutes of the hearing ordered by the Court of Appeals will be "H. ___" referring to Appellant's Appendix in the Court of Appeals in the second appeal. Certified copies of both Appendices are being filed in lieu of transcripts of the record, pursuant to Rule 21 (3).

[3] While his order to report for induction was pending, but the date of reporting postponed, he asked for, filled out and submitted a Special Form for Conscientious Objectors, SSS Form No. 150. After the Board had received his form, on June 17, 1965, he was simultaneously mailed two communications, one directing him to report for induction on July 8, 1965, and the other requesting him to appear before the Board on July 6, 1965. 368 F. 2d at 147, App., *infra*, p. 42. On July 6, 1965, he was orally informed that his claim was denied and that the induction order should be complied with. No written communication was sent to him advising that reopening was denied, as required by 32 CFR §1625.4; App., *infra*, p. 54. The District Court, while acknowledging non-compliance (260 F. Supp. at 13, App., *infra*, pp. 48-50), held that the requirement of written notice was fulfilled by oral notice. The Court of Appeals did not comment on this point, although duly raised.

[4] The Act expired on June 30, 1967. The Military Selective Service Act of 1967 went into effect on July 1, 1967. Although section 6(j) of the new Act does not provide any of the *special* appellate rights for conscientious objectors, it retains the right to an administrative appeal available to all registrants seeking a change in classification.

conscientious objector claimants were entitled to special appellate rights—including Department of Justice investigation, hearing before a special hearing officer, and advisory recommendation—in addition to an appeal to the Selective Service State Appeal Board. 50 App. U. S. C. §456(j). But various Selective Service regulations, and the action of petitioner's Local Board thereunder, sought to deny *all* of these appellate rights to petitioner or to any Selective Service registrant who did not assert his claim prior to the mailing of an order to report for induction. 32 CFR §§1625.2-1625.4; App., *infra*, p. 53.

The District Court and the Court of Appeals both approved of this denial of due process rights otherwise available. However, the Court of Appeals, in its first decision in this case, (*Gearey I*), found sufficient ambiguity in the minutes of the Local Board's action[5] to allow for the possibility that Gearey's claim might have been rejected by his Local Board *solely* because of its lateness. This, the Court held, would require reversal, if Gearey's views had not matured until after the order to report, since

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[5] The minutes of Gearey's encounter on the evening of July 8 read:

"Registrant interviewed, had decided just recently to become a c.o., said he had been thinking about it but never mentioned it. We reviewed the c.o. #150, also reviewed letter sent by Bishop Ford High School. Registrant claims he is not working there nor that he would definitely be working there in September. Said he would like to go to Europe and take pictures since this is the vocation he wants to pursue or maybe teach when he returns. The board after reviewing the evidence submitted and registrant's claims felt he did not qualify to be a genuine c.o. All facts considered did not warrant a change in classification. He was advised to report as scheduled. Vote was 4 to 0."

368 F. 2d at 147, fn. 4; App., *infra*, p. 3.

> "It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until after he received his notice, although the belatedness of a claim may be a factor in assessing its lateness. . . . The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments."

368 F. 2d at 149-150; App., *infra*, pp. 31-32.

Consequently, the Court of Appeals vacated the conviction and remanded "to enable the judge to ascertain from the Local Board precisely what it meant". (*Id.* at 151; App., *infra*, p. 34.

The District Court and the Court of Appeals likewise did not accept petitioner's further arguments (1) that he was entitled to a reopening of his case—and attendant appellate rights—upon the presentation of a non-frivolous claim for a new classification, even after an order to report; and (2) that he should not be held to the narrow standard of judicial review customary in Selective Service cases, precisely because it is posited on the existence of elaborate administrative review, which he was explicitly denied.[6]

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[6] Accordingly, the trial court refused to hear testimony as to the formulation or content of his conscientious objector beliefs, the reason for their slow maturation, and the fact that he asserted his beliefs with dispatch as soon as they were matured. Tr. 61a-70a. Such rejected offer of proof would have included, in addition to petitioner's testimony, the testimony of Brother Isadore, O. S. F. (Robert McCarron), Chairman of the Theology Department at St. Francis College, who was Gearey's professor and advisor, and who had spent many hours counseling with him on a regular basis dur-

At the remanded hearing, the District Court received the testimony of three members of the Local Board, found that the Board had not denied petitioner's claim for any improper reason, reinstated the conviction, and reimposed the two year sentence. The Court of Appeals affirmed. (*Gearey II*).

A number of occurrences at the remanded hearing provide the basis for petitioner's further contentions that the denial of his claim was without any rational basis in fact. To begin with, although the District Court found otherwise, the record amply demonstrates that the lateness of the claim was a predominating reason for its denial.[7]

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ing the period that his views were crystallizing. However, Bro. Isadore and Msgr. Robert J. Fox, Director of an anti-poverty project of the New York Archdiocese were allowed to testify as character witnesses. Tr. 71a-77a. Gearey was allowed to testify as to his Catholic religious upbringing and parochial schooling, attendance at a college run by the Franciscan Order, and employment as a teacher at a diocesan high school, Tr. 51a-58a, but he was cut off before he could explain his difficulties in coping with the questions on the Special Form for Conscientious Objectors, SSS Form No. 150, Tr. 59a. Of particular significance in explaining the slow maturation of his views would be a description of his difficulties in answering yes or no to the Supreme Being question, and the question of whether he belonged to any religious group, Tr. 98a-102a, 94a.

[7] E.g., Board Chairman Barbiere testified:

"Q. Was there any discussion as to whether this happened before or after the order to report for induction? A. It seems to us it happened after reporting for induction.

"Q. After he received the order? A. Yes, that is right.

"Q. Did that have anything to do with decision to denying his application? A. It had with me" (H. 132). See also H. 96.

Board member Elmezzi testified:

"A. Well, we would—he was already inducted—sent for induction and we—that we would review the case. Maybe something else was new; I don't know. But since he had in the past never brought up a reason like this, we couldn't see where it would

Moreover, it appeared that the only substantive questions asked of petitioner by the Local Board members on July 6, 1965, concerned his willingness to use force in defense of loved ones. Two of the three Board members testified that petitioner's statement that he would, if necessary, seek to ward off an attack on his loved ones, disqualified him from conscientious objector classification.[8] The third Board member acknowledged that the answer was satisfactory. H. 40, 44. But none of the Board members could recall any unsatisfactory answers to any other questions pertaining to religious training or belief, or any other aspect of conscientious objection.[9] There was indeed testimony that Board members regarded petitioner as "insincere", but there is strong evidence that the feeling of insincerity was based largely, if not exclusively, on the lateness of the claim.[10]

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be a conscientious objector case" (H. 151-152). See also H. 167, H. 174, H. 175.

Board member Hatterschied referred to petitioner's statement that his claim had been asserted only recently as an "admission", implying that it was an incriminating remark (H. 35). See also H. 37.

[8] E.g., testimony of Mr. Barbiere:

"Q. And you regarded an answer that he would try to ward off the attack as being unsatisfactory? A. That is right" (H. 122). See also H. 123, 124.

Mr. Elmezzi testified:

"Q. So that anyone who would use force to defend his family is not making a satisfactory answer to this question? Is that what you are saying? A. Yes" (H. 166). See also H. 161.

[9] Cf. Hatterschied, H. 44; Barbiere, H. 121, 134; Elmezzi, H. 178.

[10] Thus Mr. Elmezzi testified that Gearey was "evasive". On cross-examination he testified: "Well, the evasiveness was, it never came up. All this problem never came up until this time" (H. 167). See also Barbiere testimony: "My feeling was he just came in that evening and decided that he was a c.o. for the first time" (H. 96).

Petitioner attempted to testify in his own behalf at the hearing, but he was not permitted to do so, H. 194-196, nor was he permitted to introduce into evidence a memorandum of his version of the events which occurred at the Local Board on July 6, 1965, H. 196-199. Timely objections were recorded to both rulings. Petitioner also objected to the District Court's allowing the Government to present its entire case via a series of conclusory, leading questions,[11] all of which were designed to produce yes or no answers sufficient to meet the direction of the Court of Appeals in *Gearey I*. All of petitioner's objections were overruled, and the District Court's rulings were affirmed by the Court of Appeals.[12]

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals has decided important questions of Federal law which have not been but should be settled by this Court; because some of its holdings conflict with decisions of other Courts

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[11] E.g., the questions asked of Mr. Hatterschied:

"Q. In this interview on July 6, 1965, was the board committed to not reopening Mr. Gearey's classification on the ground that Mr. Gearey had not advanced the claim until after having received his induction notice?" (H. 9)

* * * * *

"Q. Was the board prepared in this interview on July 6, 1965 to give Mr. Gearey an opportunity to advance his position and request for reclassification as a conscientious objector without regard to the fact that he had been issued an induction order?" (H. 10)

See also Barbiere at H. 87-89, and Elmezzi at H. 153-156. In two instances, the prosecutor's complicated leading questions resulted in the witnesses' missing their signals and giving unexpected answers. See Barbiere at H. 88, and Elmezzi at H. 154.

[12] The Court of Appeals did not rule on the leading questions argument.

of Appeals, and appear to conflict with applicable decisions of this Court; and because its decision has so far sanctioned the departure of the District Court from accepted and usual standards of judicial proceedings as to call for an exercise of this Court's power of supervision.

I

There is a direct conflict between the statute, 50 App. U. S. C. §456(j), which granted appellate rights, both regular and special, to *all* conscientious objector claimants, and the regulation which sought to deny these rights in the case of claims asserted after an order to report for induction. 32 CFR §1625.2; App., *infra*, p. 53. The Court of Appeals held for the regulation because:

> " . . . it is essential and proper for an administrative agency . . . to require that claims be raised within reasonable time limits or be forfeited."

368 F. 2d at 149; App., *infra*, p. 31.[13]

The case was one of first impression in the Second Circuit, the Court indicating that it agreed with similar decisions in other circuits.[14] *Ibid.*, footnote 9. But the opinion does not reveal that the law in the Third Circuit is

[13] The Court of Appeals' brief discussion of this point is exclusively in *Gearey I*. In *Gearey II*, it stated that it declined to reconsider any of the arguments directed to this point, App., *infra*, p. 14, fn. 11, although some of them were raised for the first time, in the context of the record of the remanded hearing.

[14] Although the Court of Appeals also listed a Seventh Circuit decision, *United States* v. *Schoebel*, 201 F. 2d 31 (1953), it did not comment on *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, 635 (7th Cir. 1945) which affirmed the right to a statutorily-entitled deferment at any time prior to actual induction, notwithstanding any contrary regulation.

sharply to the contrary. Courts in the Third Circuit have held consistently that where the registrant comes within the provisions of the conscientious objector statute, or any other statutory deferment, any contrary procedural regulation is invalid. *United States* v. *Underwood,* 151 F. Supp. 874, 876 (E. D. Pa. 1955); *Sorenson* v. *Selective Service System,* 203 F. Supp. 786, 792 (E. D. Pa. 1962); *United States* v. *Brown,* 129 F. Supp. 237, 238 (D. N. J. 1955); *United States* v. *Clark,* 105 F. Supp. 613, 615 (W. D. Pa. 1952); cf. *United States ex rel. Berman* v. *Craig,* 207 F. 2d 888, 891 (3d Cir. 1953); *United States* v. *Zasadni,* 206 F. Supp. 318, 321, n. 3 (W. D. Pa. 1962); *United States* v. *Vick,* unreported (E. D. Pa. Cr. #2292, Sept. 22, 1965).[15]

As District Judge Ganey (now Third Circuit Judge) held in *Underwood*:

> "It is plain that a person meeting the conditions of the above section of the Act is not to be subjected to combatant training and service. This privilege is not to be defeated by procedural regulations. Nowhere in the Act does it provide that unless the registrant makes his claim before the notice of induction he thereafter waives his right to the privilege. Had Congress so intended, it would have set forth such intention in unmistakable terms."

151 F. Supp. at 876.

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[15] *Accord: United States* v. *Sobczak,* 264 F. Supp. 752, 756 (N. D. Ga. 1966); *United States* v. *Crawford,* 119 F. Supp. 729 (N. D. Cal. 1954) (Selective Service regulations may not "circumvent the clear language of the statute", even where conscientious objector claim not asserted until nine months after order to report).

The argument in the *Underwood* decision, as well as the other cases cited both within and without the Third Circuit is supported by the scholarly writing on this subject. " . . . [T]he right to claim an exemption was intended to be available up to the moment of induction . . . ," Clancy and Weiss, "The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations", 17 Maine L. Rev. 143, 146 (1965). *Accord*: "Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption", 72 Yale L. J. 1459, 1465 (1963).

This Court should resolve the conflict between the circuits[16] by holding that a Selective Service regulation which is "out of harmony with the statute is a mere nullity". *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129, 134 (1936).[17]

The Court of Appeals held in *Gearey I* that there is a substantive right to claim conscientious objector status for a young man whose views do not mature until after the receipt of an order to report for induction. This means that no obloquy or discrimination may be suffered by one who asserts a post-order to report claim, so long as both

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[16] Further conflict between the circuits is imminent inasmuch as the Ninth Circuit has recently intimated that it disagreed with *Gearey I*. *Parrott* v. *United States*, 370 F. 2d 388, 395 (1966).

[17] In *United States* v. *Nugent*, 346 U. S. 1 (1953), this Court held that the special procedural rights for conscientious objector claimants must "be made available whenever a registrant insists that his conscientious objector claim has been misjudged by his local board." *Id.* at 8-9. The Ninth Circuit read this language to mean that in the event of "a clear conflict between the regulation and the statute", the statute must prevail. *De Moss* v. *United States*, 218 F. 2d 119 (9th Cir. 1954), rev'd on conf. of error, 349 U. S. 918 (1955).

the assertion of the claim, and the crystallization of the views upon which it is based, both followed the order to report. See 368 F. 2d at 149-150; App., *infra*, pp. 31-32. This was an important holding because decisions in other Circuits had apparently adopted the view of the Selective Service System[18] that the regulation in question, 32 CFR §1625.2, validly barred all post-order to report claims. See *United States* v. *Taylor*, 351 F. 2d 228 (6th Cir. 1965); *Boyd* v. *United States*, 269 F. 2d 607 (9th Cir. 1959); *United States* v. *Schoebel*, 201 F. 2d 31 (7th Cir. 1953).

But the Court below gave with one hand and took back with the other. After articulating this humanitarian principle, it invested in the Local Board complete, unappealable, and virtually judicially unreviewable[19] discretion to determine if the late claimant falls within the favored category.[20] By depriving late claimants of all appellate rights, no allowance is made for the possibility that the Local Board might err in making the very delicate chronological and substantive determinations, which it is required to

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[18] See Hershey, *Legal Aspects of Selective Service* 32, and cases cited in fn. 93 (1963). Such was the view taken by the General Counsel of the Selective Service System in his letter to the New York City Director forwarding this case for prosecution. Letter of Aug. 17, 1965, included in Govt's Exhibit 2 in Court of Appeals Record of *Gearey I*.

[19] Because of the limited judicial review which it held applicable to this type of Local Board decision. See *infra*, pp. 22-24.

[20] All that *Gearey I* requires is that the late application be "considered by the Local Board." 368 F. 2d at 150; App., *infra*, p. 32. There is not even a requirement that the claimant receive a hearing, or even an "interview".

make under the rule[21] laid down by the Court of Appeals.[22] Unless a Gearey-type late claimant is held entitled to the same or equivalent appellate rights as a pre-order claimant, the noble principle enunciated will surely be frustrated in many cases,[23] as indeed petitioner urges that it was frustrated here.

The only justification presented for this arbitrary cut-off of statutory rights is not a legal one, but a policy consideration. The Court below fears that chaos would result and the meeting of manpower quotas would be affected because of a flood of late claims. 368 F. 2d at 149; App., *infra*, p. 30. The Court offered no documentation to support this fear. Petitioner submits that this speculative policy justification is unpersuasive for a number of reasons. First, the total number of men seeking conscientious objec-

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[21] "[T]he Local Board must first determine when an applicant's beliefs matured. If the Board properly concludes that the claim existed before the notice was sent, the classification may not be reopened. If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify . . . he would be entitled to be reclassified by the Local Board." 368 F. 2d at 150; App., *infra*, pp. 32-33.

[22] The purpose of any appeal is to guard against the possibility of error. Certainly that possibility is no less present where the Local Board is instructed that "the belatedness of a claim may be a factor in assessing its genuineness." 368 F. 2d at 149-150; App., *infra*, p. 32.

[23] That injustices will be inevitable under these circumstances is demonstrated by the Report of the National Advisory Commission on Selective Service (the Marshall Commission) (1967):

> "There is a disparity between the attitudes of local boards concerning the 1-O (C.O.) classification. This area may be characterized by particularly strong differences of opinion between the registrant and the local board; for example in one state over half of the local board members (55%) think conscientious objectors should not be deferred at all." (*Id.* at 108-109.)

tor status continues to be very small.[24] Second, a deliberate bad faith applicant, a draft dodger who presents a sham or frivolous claim, will be more likely to present it well within the time limits; it is the sincere but slow-crystallizing claimant who will be likely to be affected. Third, the problem of delay, if it should ever exist,[25] can be easily met by an expedited process of hearing and appeal for post-order to report claims. See 72 Yale L. J. at 1468.

The decision below thus creates a differentiation in treatment, based on the time of maturation of religious beliefs. There is more due process for early believers and less due process for late believers. Constitutional questions of infringement of religious liberty are raised, since this is scarcely different from a preference of "one religion over another", *Everson* v. *Board of Education,* 330 U. S. 1, 15-16 (1947). See *Sherbert* v. *Verner,* 374 U. S. 398 (1963); *Torcaso* v. *Watkins,* 367 U. S. 488 (1961). This Court should grant certiorari to either resolve this important constitutional question, or to so construe the statute and regulation as to make such resolution unnecessary. See *United States* v. *Seeger,* 380 U. S. 163 (1965).

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[24] See Report of National Advisory Commission on Selective Service, Table 5-4, pp. 136-143 (1966). See also Goodman, "They March to Different Drummers", New York Times Sunday Magazine, June 26, 1966, pp. 7, 43: "Today the percentage of conscientious objectors in the draft population is about the same as during World War II."

[25] The court was "especially" concerned about the delay incumbent in "a protracted process of Justice Department investigation and hearing". Since July 1, 1967, the special appellate procedures for conscientious objector claimants have been abolished. Military Selective Service Act of 1967, §6(j). Under the new Section 6(j), conscientious objector claimants are entitled to the same administrative appeal within the Selective Service System as is available for all other categories of claimants, and no more. Consequently, a great deal of this argument has been rendered non-existent.

II

The Court of Appeals likewise rejected petitioner's argument that the presentation to a Local Board of a non-frivolous claim for any change in classification, conscientious objector or otherwise, requires reopening and classification anew.[26] Although this Court has never ruled on the question, many decisions of Courts of Appeals have held or suggested that a refusal to reopen under such circumstances is a denial of due process. *Townsend* v. *Zimmerman*, 237 F. 2d 376 (6th Cir. 1956), per Circuit Judge [now Mr. Justice] Stewart); *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888 (3d Cir. 1953); *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, 635 (7th Cir. 1945); cf. *United States* v. *Vincelli*, 215 F. 2d 210, 213 (2d Cir. 1954), pet. for rehrg. denied, 216 F. 2d 681 (2d Cir. 1954); *United States* v. *Packer*, 200 F. 2d 540 (2d Cir. 1952), reversed sub nom. *United States* v. *Nugent*, 346 U. S. 1 (1953); see also *United States* v. *Stepler*, 258 F. 2d 310 (3d Cir. 1958); *Olvera* v. *United States*, 223 F. 2d 880 (5th Cir. 1955); *United States* v. *Ransom*, 223 F. 2d 15 (7th Cir. 1955); *United States* v. *Henderson*, 223 F. 2d 421 (7th Cir. 1955); *United States* v. *Peebles*, 220 F. 2d 114 (7th Cir. 1955); *Brown* v. *United States*, 216 F. 2d 258 (9th Cir. 1954); *United States* v. *Burlich*, 257 F. Supp. 906 (S. D. N. Y. 1966).

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[26] Sections 1625.2 and 1625.4 of the Regulations; App., *infra*, pp. 53-54, give the Local Board discretion to determine whether or not to reopen. Reopening, even if the same classification is renewed, invests in the registrant all of the procedural rights available upon an initial classification. Sections 1625.11, 1625.12, 1625.13; App., *infra*, pp. 54-55, and requires cancellation of any outstanding induction order, Section 1625.14; App., *infra*, p. 55.

United States v. *Vincelli, supra,* is particularly significant, since the Second Circuit[27] held in 1954: (1) broadly that reopening was required "when the basis of an application is not clearly frivolous", and (2) specifically that the sending of a conscientious objector questionnaire was in itself a reopening.

The Court below in *Gearey I* totally neglected petitioner's broader argument, and acted as if the only claim made based on *Vincelli* was that the mere sending of the form constituted a reopening. 368 F. 2d at 151; App., *infra,* p. 35. The Court then construed the decision of this Court in *United States* v. *Nugent,* 346 U. S. 1 (1953), which reversed sub nom. *United States* v. *Packer,* 200 F. 2d 540 (2d Cir. 1952), as "inferentially" indicating its view that the sending of a conscientious objector questionnaire "is not, *ipso facto,* a reopening". 368 F. 2d at 152; App., *infra,* p. 35. There is not a single word, inferential or otherwise, in this Court's decision in *Nugent* which so holds.[28] The Court below supports this "inference" by construing dicta[29] in the split decision on rehearing in *Vincelli,* 216 F. 2d 681 (1954). Thus, the confusion is plain, and only a decision by this Court can clarify whether or not *Nugent's* reversal of *Packer* was likewise a reversal of *Vincelli.*

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[27] The panel consisted of Chase, Chief Judge, and Frank and Hincks, Circuit Judges.

[28] This Court's decision in *Nugent* was that a registrant is not entitled to a full copy of the FBI report. (It held in *Simmons* v. *United States,* 348 U. S. 397 (1955) that he is entitled to a fair resume thereof.)

[29] Clearly dicta, because all three judges joined in denying the Government's petition for rehearing on other grounds.

The Court below in *Gearey II*, did respond somewhat to petitioner's broader reopening argument based on *Vincelli*, App., *infra*, p. 14, footnote 11. It rejected the contention on two grounds. First, it said that there was a distinguishing element in the cases which follow *Vincelli* and support reopening, i.e., that they all involved consideration of "objective facts", which presumably is not the case in a conscientious objector claim. The Court erred in its reading since some of the cases did involve conscientious objector claims.[30] Moreover, even a cursory review of the questions which must be answered on the Special Form for Conscientious Objectors will demonstrate the large number of "objective facts" which are involved in such a claim. See Selective Service System Form No. 150.[31]

Secondly, it argues that in the cases cited, the request for reclassification preceded the order to report for induction. With respect, the Court erred again since in one of the cited cases, the non-frivolous request for reopening was after an order to report for induction.[32]

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[30] See *Olvera* v. *United States*, 223 F. 2d 880 (5th Cir. 1955); *United States* v. *Peebles*, 220 F. 2d 114 (7th Cir. 1955). Most of the other cases involved claims by Jehovah's Witnesses for ministerial exemptions, the determination of which requires subjective and objective judgments similar to those in conscientious objector cases.

[31] The Selective Service System takes the position that "objective facts may be determinative of a conscientious objector claim", adverse to the claim. Hershey, *Legal Aspects of Selective Service* 10 (1963).

[32] *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3d Cir. 1953). See also *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, 635 (7th Cir. 1945). In any event, if petitioner's argument in Point I is tenable, this limitation is null and void, at least for conscientious objector claimants. See pp. 13-18, *supra*.

Moreover, the Court has not even attempted to explain or distinguish the broader holding of *Vincelli* itself,[33] which was a "non-objective" conscientious objector claim.

In any event, if *Vincelli* is applicable, then petitioner's conviction cannot stand. Certiorari should be granted, not only to declare the full meaning of *Vincelli* and the related cases, but to clarify the entire troublesome and important question of rights to reopening of a Selective Service classification.

III

The Court of Appeals held that the narrow standard of judicial review—any rational basis in fact—is applicable to petitioner's conscientious objector claim. Such limited review has been upheld by this Court only where the defendant was protected by the administrative review procedures of the Selective Service System. Analysis of this Court's decisions indicates that unless conscientious objector claimants receive the procedural rights that the statute grants them, the narrow basis of judicial review may be neither applicable nor constitutionally tolerable.[34]

In the leading decision, *Estep* v. *United States*, 327 U. S. 114 (1945), Mr. Justice Douglas' majority opinion noted the thorough administrative scrutiny of a claim before holding that the statute allowed limited judicial review of the Selective Service proceedings. 327 U. S. at 116. The concurring opinions further indicate the importance of

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[33] Even if its interpretation of the demise of the narrow holding of *Vincelli* is correct, it could not claim that anything in *Nugent*, or *Packer*, or *Vincelli* on rehearing, diminished the holding that the presentation of a non-frivolous claim requires reopening.

[34] This argument was made below but there is no indication that it was considered in either *Gearey I* or *Gearey II*.

administrative appellate remedies to the application of narrow judicial review. Mr. Justice Frankfurter, believing that the statute should be interpreted to bar judicial review, based this conclusion on the administrative remedies available to the claimant:

> "Congress deemed it imperative to secure a vast citizen army with utmost expedition. It did so with due regard for the individual interests by giving ample opportunities, within the elaborate system which it established for supervision of the decisions of the multitudinous draft boards on the selection of individuals for service."

327 U. S. at 137 (Frankfurter, J., concurring).[35]

This concern was also voiced by Mr. Justice Murphy:

> "Before a person may be punished for violating an administrative order due process of law requires that the order be within the authority of the administrative agency and that it not be issued in such a way as to deprive the person of his constitutional rights."

327 U. S. at 126-127 (Murphy, J., concurring).

Subsequent decisions of this Court have also linked limited judicial review with administrative procedural safeguards. Thus, in *Witmer* v. *United States*, 328 U. S. 375 (1955), this Court detailed the administrative remedies

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[35] "Congress has not given to the local board authority to decide when such statutory rights of appeal may be availed of, nor to make 'final' unwarranted action by a board whereby such appeal is frustrated. . . . Accordingly, if a registrant does not obey an ordered induction because the board has cut off the opportunity which the statutes give him to appeal to higher authority, his obligation of obedience has not yet matured." *Id.* at 144.

available to a registrant immediately prior to restating the absence of direct judicial review. 348 U. S. at 376-377. Both *Simmons* v. *United States*, 348 U. S. 397 (1955) and *Gonzales* v. *United States*, 348 U. S. 407 (1955) held for conscientious objector claimants who had not received their full procedural rights. The Court, in *Simmons*, termed the claimant's right to a fair hearing a "fundamental safeguard." 348 U. S. at 406.

The Court below held, in *Gearey II*, that limited judicial review is applicable. App., *infra*, p. 11. Yet it held, in *Gearey I*, that post-induction order conscientious objector applicants need only have their claims "considered" by the local board, 368 F. 2d at 150, App., *infra*, p. 5, with no specification of any procedural rights to assure that such consideration will be fair. Limited judicial review may allow administrators to err in finding facts, but it does not allow them to disregard their statutory mandate for assuring thorough scrutiny of a conscientious objector claim. See 4 Davis, *Administrative Law* §28.12 (1958). The reasons for giving equivalent appellate rights to Gearey-type late claimants are the same as for pre-order claimants. The possibility of error exists equally in either case.[36]

This Court should hold that since the limited standard of judicial review is linked to the availability of administrative review, there must be broader judicial review where administrative review is not available. Certiorari should in any event be granted to clarify and settle this important question of the extent of judicial review.

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[36] Indeed, the possibility of error is perhaps greater in the case of a late claimant, since the Board is directed that it may take the lateness into account. See footnote 22, *supra*, p. 17, and accompanying text.

IV

It is fundamental that a denial of a conscientious objector classification must have a rational basis in fact to survive judicial review. As the Court of Appeals held in *Gearey I*, an order to report for induction, which follows such a denial, can only be held valid "provided the judge found a rational basis for it." 368 F. 2d at 150-151, App., *infra*, p. 6. *Gearey I* held, quite properly, that in the case of a claim which matured and was asserted post-order, its denial because of the belated assertion would be irrational. *Gearey II*, however, invokes the doctrine of limited judicial review, and thereby gives its imprimatur to precisely such an irrational classification. Petitioner respectfully urges that a reading by this Court of the entire record of *Gearey II*[37] will disclose that the Court below failed to adhere to its own rule.

Petitioner urges that a fair reading of the record of *Gearey II* will demonstrate the contaminating influence of another irrational consideration. At least two members of the Local Board plainly had the erroneous view that petitioner did not qualify since he stated his readiness to use force to ward off an attack on his loved ones.[38] Neither the third member, who disagreed with this erroneous view, nor either of the other two, could recall a single other question or answer concerning petitioner's qualifications.[39]

The Court below does not dispute petitioner's contention that a disqualification on such grounds would be erroneous,

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[37] Excerpts which illustrate the predominance of this irrational factor are at pp. 8-12, *supra*.

[38] See excerpts of this testimony at p. 11, *supra*.

[39] See p. 11, *supra*.

App., *infra,* p. 9. But the Court finds a distinction between the many cases which hold that belief in use of force under such circumstances is no proper disqualification,[40] and the instant case which affirms Local Board action where petitioner was disqualified for precisely this reason. The suggested distinction is that "in each of the cited cases the evidence was *uncontroverted* that the registrant was opposed to participation in war." App., *infra,* p. 10. With respect, even assuming the validity of this novel distinction, it is not supported by "each of the cited cases." [41]

The Court below, in any event, holds that the Local Board's strong feelings about Gearey's insincerity outweighs any erroneous legal views on which the Board simultaneously "*may* have relied on to some extent," [42] App., *infra,* p. 12. Petitioner contends that the Court of Appeals has thereby repudiated an important rule of law that

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[40] See, e.g., *Sicurella* v. *United States,* 348 U. S. 385 (1955); *Jessen* v. *United States,* 212 F. 2d 897, 899 (10th Cir. 1954); *United States* v. *Hartman,* 209 F. 2d 366 (2d Cir. 1954); *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. 1953); *United States* v. *Parmiter,* 173 F. Supp. 677, 687-689 (S. D. N. Y. 1959); see Hershey, *Legal Aspects of Selective Service* 12 (1963).

[41] In *United States* v. *Hartman, supra,* what was uncontroverted was that appellant therein was a Jehovah's Witness. This is a far cry from an assumption of sincerity. And in *United States* v. *Parmiter, supra,* the Selective Service System, and presumably the prosecution, argued that the registrant's attitude was based on selfish reasons.

[42] The Court below italicizes *"may"*, presumably to suggest some doubt as to whether the Board relied on Gearey's unexceptionable answers. The record is clear that two of the three testifying members were unequivocal in their testimony that these answers disqualified petitioner from the conscientious objector classification which he sought. See pp. 10-11, *supra.*

this Court, and Courts of Appeals have consistently followed in Selective Service cases. Until *Gearey II*, the rule was absolute that where the record discloses two reasons for denying a claim, one lawful, and the other unlawful, fairness, if not due process, requires reversal lest injustice be done.[43] The *Gearey II* court has now stated its readiness to depart from that humane rule, by the utilization of some extraordinary process of divination which will reveal whether or not the Board "relied on" the proper or the improper ground, both of them concededly being in the record. This Court should grant certiorari to review whether or not such unprecedented[44] judicial mind-reading can be a sufficient basis to send a man to jail.

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[43] *Sicurella* v. *United States, supra; United States* v. *Jakobson*, 325 F. 2d 409, 416-417 (2d Cir. 1963); *United States* v. *Kretchet*, 284 F. 2d 561 (9th Cir. 1960); *United States* v. *Yppasila*, 219 F. 2d 465 (10th Cir. 1954); *United States* v. *Shepherd*, 217 F. 2d 942 (9th Cir. 1954); *United States* v. *Hagaman*, 213 F. 2d 86 (3d Cir. 1954).

[44] The Court below cites no prior cases to support the distinction.

V

Certiorari should also be granted in the exercise of this Court's power of supervision because the decision of the Court of Appeals in *Gearey II* has sanctioned the departure of the District Court from accepted and usual standards of judicial practice. Such departure was manifested at the hearing in two respects: (1) refusing to allow petitioner to testify and to introduce documentary evidence; and (2) permitting the prosecution to "prove its case" via a series of conclusory, leading questions, all obviously designed to elicit the yes or no answers thought necessary to show a proper compliance with the standard laid down in *Gearey I* to sustain the conviction.

By forbidding petitioner from testifying in his own defense in a criminal proceeding, the Courts below violated his constitutional and statutory rights; U. S. Constitution, Fifth Amendment, Sixth Amendment; 18 U. S. C. §3481; *Poe* v. *United States,* 233 F. Supp. 173, 176 (D. C. 1964) aff'd 352 F. 2d 639 (D. C. Cir. 1965).[45]

The District Court barred petitioner from testifying at the hearing because it believed it was so directed by the Court of Appeals in *Gearey I,* 266 F. Supp. at 162, App., *infra,* p. 20. The Court of Appeals in *Gearey II* did not explicitly approve of the exclusion, but concluded that it did not in any event amount to reversible error, App., *infra,* p. 12, because it could not see "the relevance"

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[45] Petitioner's counsel have not found a single reported precedent for such a denial of a defendant's right to testify, and the Court cites none. There is nothing strange about a defendant testifying in a Selective Service case. See *Niznik* v. *United States,* 173 F. 2d 328 (6th Cir. 1949), 184 F. 2d 972 (6th Cir. 1950); *United States* v. *Parmiter,* 173 F. Supp. 677, 688, 689 (S. D. N. Y. 1959).

of petitioner's testimony.[46] This Court should grant certiorari and hold that a defendant's right to testify in a criminal proceeding is absolute and not to be balanced against a court's prediction (or retrospective appraisal) of whether or not it would be (or might have been) irrelevant.

Petitioner submits that the trial court also committed reversible error by allowing the prosecution's entire case to be presented by leading questions of such an obvious and conclusory nature[47] that the prosecutor might just as well have dispensed with the witnesses and testified

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[46] The *Gearey II* court held that the exclusion was proper because petitioner could not testify as to the state of mind of the Board members, and thereby clear up the ambiguous entry in the minutes. But it is clear from the colloquy quoted in footnote 9, App., *infra*, p. 11, that petitioner was prepared to testify to everything which the Board members said in his presence. There is hardly any more appropriate way of showing state of mind at a particular time, than via the words uttered at such time by the persons whose states of mind are the subject of the inquiry. The *Gearey II* court also sanctioned the action of the District Court in refusing to allow the introduction into evidence of petitioner's contemporaneous memorandum of what happened at the Local Board on July 6, App., *infra*, p. 12. The District Judge never saw the memorandum, believing that he was barred by the Court of Appeals' direction; 266 F. Supp. at 162, App., *infra*, p. 20. But the Court of Appeals read it, and construed it in a peculiarly triple negative fashion—that it "does not reveal that the Board had no basis upon which it could reasonably have concluded that appellant was not sincere". App., *infra*, p. 14. Petitioner submits that this is not the proper standard of judicial review of admissibility of evidence in Selective Service cases. The memorandum is at H. 9a, and this Court can read it, as the Court of Appeals could. But the Court which was directed to resolve the ambiguity did not read it, because it believed it was ordered not to do so.

[47] See footnote 11, *supra*, p. 12, and accompanying text. "Questions . . . which so suggest the *specific tenor of the reply as desired by counsel* that such a reply is likely to be given irrespective of an actual memory, are illegitimate." 3 *Wigmore on Evidence* §769 (3d Ed. 1940). *Accord: United States* v. *Durham*, 319 F. 2d 59 (4th Cir. 1963).

himself.[48] The extent to which leading questions may be permitted is within the discretion of the Court, 3 *Wigmore on Evidence,* §770 (3d Ed. 1940), but this must be a reasoned discretion, see *Linn* v. *United States,* 251 Fed. 476, 482 (2d Cir. 1918); and where there is a strong showing of prejudice a conviction based in part on improper leading questions must be reversed; *State* v. *Hazlett,* 105 N. W. 617 (N. D. 1905); *Coon* v. *People,* 99 Ill. 368, 39 Am. Rep. (1881); 3 Wharton *Criminal Evidence* §847 (12th Ed. 1955). The questions were clearly prejudicial, and the failure to sustain the objections, combined with the failure to allow defendant to testify, resulted in a hearing which was profoundly unfair, and in violation of due process.

Neither the District Court nor the Court of Appeals touched on this point in their respective post-hearing decisions. While ordinarily questions of admissibility of evidence and trial procedure are not the concern of this Court, where the departure from due process standards is so egregious, this Court should grant certiorari in the exercise of its supervisory powers over Federal Courts.

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[48] Indeed, in the Government's brief in *Gearey II,* the prosecution urged that no testimony would be necessary: "A simple confirming letter from the board . . . would have been sufficient" (p. 19).

CONCLUSION

The introductory words of *Gearey I* illuminate the importance of this case at this time, 368 F. 2d at 146, App., *infra*, p. 24. Events subsequent have emphasized the importance of the issues raised, and have added additional questions, of equal importance in the fair administration of "our system of conscription." *Ibid.*

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

2nd Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 519—September Term, 1966.

(Argued June 20, 1967 Decided July 3, 1967.)

Docket No. 31403

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID ARTHUR GEAREY,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and KAUFMAN, *Circuit Judges.*

Appeal from the reinstatement of a judgment of conviction (previously vacated by this Court and remanded) for failing to submit for induction into the armed forces, in violation of 50 U. S. C. App. §462(a), entered in the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*, after a hearing directed by this Court. See 368 F. 2d 144, 151 (1966).

Affirmed.

MARVIN M. KARPATKIN (Rhoda H. Karpatkin, Karpatkin, Ohrenstein & Karpatkin, New York, N. Y., on the brief), *for appellant.*

PAUL K. ROONEY, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York; John S. Allee, Assistant United States Attorney, on the brief), *for appellee.*

KAUFMAN, *Circuit Judge*:

We previously vacated the conviction of David Arthur Gearey for refusing to submit for induction into the armed forces, in violation of 50 U. S. C. App. §462(a), and remanded the case to the District Court for a hearing on areas that were in need of elucidation. 368 F. 2d 144 (1966). Judge Murphy, who had been the trial judge, conducted the hearing. Thereafter, he reinstated Gearey's conviction and sentence of 2 years' imprisonment. Appellant asks us, once more, to set aside his conviction, claiming, *inter alia,* that the District Court failed at the hearing to follow the directions contained in our opinion. In addition, he urges that the Local Board's refusal to reclassify him as a conscientious objector was based on an erroneous view of the law.

I.

The facts leading to Gearey's conviction are set forth fully in our prior opinion and we shall therefore avoid a detailed recital of the tortuous Selective Service proceedings that stretched over a 6-year period. Between October 1960, when Gearey first registered with his Local Board and January 1965, he received student deferments, never claiming to be a conscientious objector. In mid-February 1965, appellant's Draft Board was notified by St. Francis

College that Gearey was no longer enrolled as a student. When appellant failed to provide proof of attendance, the Board revoked his student deferment (2-S) and reclassified him I-A (available for military service). On April 19, an Order to Report for Induction on May 5 was mailed to appellant. But on April 23 Gearey asked that his I-A classification be reviewed and that the date of induction be postponed. The Board complied by rescheduling his induction for July.

It was not until May 24, however, that Gearey for the first time asked the Board to send him the special questionnaire for conscientious objectors (SSS Form #150). After the form was returned to the Board, Gearey was invited to appear for an interview on July 6. Upon the conclusion of that hearing, Gearey was informed by the Board that it did not believe he was a "genuine c.o" and, therefore, a change in his classification was not warranted.[1] Two days later appellant appeared for induction, but refused to take the symbolic step forward when ordered to do so. He was subsequently arrested, tried by Judge Murphy, sitting without a jury, and convicted.

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[1] The following summary of that hearing was prepared by the Board:

> Registrant interviewed, had decided just recently to become a c.o., said he had been thinking about it but never mentioned it. We reviewed the c.o. #150, also reviewed letter sent by Bishop Ford High School. Registrant claims he is not working there nor that he would definitely be working there in September. Said he would like to go to Europe and take pictures since this is the vocation he wants to pursue or maybe teach when he returns. The board after reviewing the evidence submitted and registrant's claims felt he did not qualify to be a genuine c.o. All facts considered did not warrant a change in classification. He was advised to report as scheduled. Vote was 4 to 0.

II.

On his first appeal, Gearey's principal argument was that he had been improperly denied the procedural safeguards (including the right to present his case to the Selective Service Appeal Board) contained in §6(j) of the Universal Military Training and Service Act, 50 U. S. C. App. §456(j).[2] The government, on the other hand, contended that the Local Board was barred from considering appellant's claim of conscientious objection by 32 C. F. R. §1625.2, which provides in part:

> The local board may reopen and reclassify anew the classification of the registrant . . . provided . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

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[2] That section provides in part that:

> Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned and such person shall be notified of the time and place of such hearing. . . . If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board.

We recognized that §1625.2 was a reasonable regulation, designed to require registrants to raise their claims for deferment as soon as they had matured, thereby avoiding a process of endless challenges. Any other construction, we believed, would work havoc upon the Selective Service System and manpower quotas could rarely be met with any reasonable degree of certainty. We therefore concluded that it was entirely just to require that claims be raised within reasonable time limits in the interest of orderly administrative proceedings. Thus, it was proper to apply §1625.2 to registrants whose claims, though maturing *before* an Order to Report for Induction had been mailed, were not presented to the Board until *after* the receipt of that order. Such individuals, it seemed clear to us, were afforded ample opportunity to raise their claims before receiving an order to report, and had no justifiable complaint when the Board refused to reopen their classification.

But, we went on to note, "the considerations are quite different . . . when a claim of conscientious objection, raised for the first time after receipt of an induction notice, is based on a claim *which had not previously matured*. . . . It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until after he received his notice . . . ." 368 F. 2d at 149-50. (Emphasis added; footnote omitted.) This country's long history of exempting conscientious objectors, together with the statutory rights afforded to such claimants, led us to conclude that one who raised a claim of conscientious objection promptly after it matured, had a right to have the Board consider his request for reclassification—even if the claim was not raised until after an induction notice had been sent. Applying these principles to Gearey's case, we concluded that the District Court

should determine whether the Board had erroneously refused to consider appellant's claim solely because it was not raised until after he received his induction notice.

Upon remand, Judge Murphy conducted a hearing at which Board Chairman Frank Barbiere, Board Secretary William Hatterschied, and Board Member Thomas Elmezzi were questioned by an Assistant United States Attorney, and then subjected to intense cross-examination by defense counsel.[3] The Judge, however, declined to permit Gearey to testify or to introduce in evidence a memorandum (Defendant's Exhibit A for Identification) containing his recollections of the July 6 interview with the Board.

Based upon the testimony elicited at this hearing, Judge Murphy concluded that when the Board interviewed Gearey on July 6, the members were ready to reclassify him as a conscientious objector, despite the induction notice, if they could be persuaded that his claim was sincere. Judge Murphy found that the Board believed that Gearey "was not then, and never had been a genuine conscientious objector," 266 F. Supp. 161 (S. D. N. Y. 1967) and for this reason refused to reclassify him. The District Judge also held that the evidence adduced both at the trial and at the remand indicated that there was a rational basis for this conclusion, and, accordingly, he reinstated Gearey's conviction.[4]

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[3] James P. McGrattan, the other member of the Board who interviewed Gearey, was unable to recall appellant or the interview.

[4] Judge Murphy also ruled that Gearey's beliefs had matured before the induction notice was sent to him. Because we agree with Judge Murphy that the Board rationally concluded that Gearey was not a genuine conscientious objector, we find it unnecessary to consider this alternate holding.

III.

Two of appellant's claims need not detain us long. Gearey argues that the testimony of the Board members demonstrated that they rejected his claim of conscientious objection either "exclusively or principally because of its lateness," and that this was contrary to the rule of law announced in our earlier decision. Our response to this is that appellant misreads the opinion in *Gearey I*. We remanded the case because we were uncertain whether the Board had refused to reopen Gearey's classification "on the ground that [he] had not advanced his claim before the mailing of the induction notice, even though the claim had not matured until later." 368 F. 2d at 151. The District Court, therefore, was to determine whether the Board had refused to *consider* appellant's claim simply because of the late date at which it was raised. But we explicitly noted that "the belatedness of a claim may be a factor in assessing its genuineness." *Id.* at 150.

Our review of the record reveals overwhelming support for Judge Murphy's finding that the members of the Board did consider Gearey's claim despite the receipt by him of an induction notice, and that he would have been reclassified if his conscientious objection claim were genuine.[5]

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[5] Member Barbiere, for example, gave the following testimony:

The Court: Were you committed on one line of thinking or some other line?

The Witness: We were pretty wide open to accept if he came in with a good reason. We were hoping for a good reason.

The Court: You would have accepted him as a conscientious objector?

The Witness: We would.

The Court: If you were satisfied?

The Witness: Yes, we would. [Record of Hearing at 91.]

While it appears that the belated nature of the claim did cause skepticism concerning its sincerity, we can see no impropriety in considering this element. In any event, this was but one of several factors which the Board relied upon in denying appellant's claim. See part IV, *infra*.

Equally without merit is Gearey's contention that the Local Board failed to follow the procedures set forth in our prior decision, since no effort was made to determine when Gearey's beliefs matured. Here too, appellant has misread our opinion. We were merely setting forth guidelines to be followed by Local Boards in the future when confronted with a post induction notice claim of conscientious objection.

> [T]he Local Board must first determine when an applicant's beliefs matured. If the Board properly concludes that the claim existed before the notice was sent, the classification may not be reopened. If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector, then a change in status would have occurred "resulting from circumstances over which the registrant had no control," and he would be entitled to be reclassified by the Local Board. 368 F. 2d at 150. (Footnote omitted.)

This procedure was devised in order to insure that Boards will hereafter reach the merits of a registrant's claim of conscientious objection, despite its assertion after the receipt of an induction notice, provided his beliefs had not matured before that time. But when the record reveals, as it does in the present case, that the Board members have

in fact considered the registrant's claim on its merits, and have rejected it only because they believe that it is not genuine, it would be labor in vain to require the Board to determine when the claim matured. We made this clear in *Gearey I* when we instructed the District Court that:

> If [the Board] meant either that Gearey never was "a genuine c.o." *or* that whatever his beliefs were on the subject, they had matured before the induction notice was sent, and if the judge is convinced of the rationality of such a view, Gearey's conviction may stand; otherwise the indictment must be dismissed. 368 F. 2d at 151. (Emphasis added; footnote omitted.)

IV.

Gearey raises two other arguments which require further analysis. He contends that his conviction must be reversed because the Board relied on an erroneous reason in refusing to reclassify him. Appellant refers us specifically to the testimony of members Barbiere and Elmezzi who, he says, stated that Gearey did not qualify as a conscientious objector because he allegedly answered, in response to pointed queries, that he would use force to ward off an attack on his "girl" or other loved ones.

It is true, as appellant contends, that a registrant's belief in the use of force in self-defense is not inconsistent with a conscientious objection to participation in war in any form. See *Sicurella* v. *U. S.*, 348 U. S. 385 (1955); *Jessen* v. *U. S.*, 212 F. 2d 897 (10th Cir. 1954) (footnote omitted); *U. S.* v. *Hartman*, 209 F. 2d 366 (2d Cir. 1954); *U. S.* v. *Pekarski*, 207 F. 2d 930 (2d Cir. 1953); *Taffs* v. *U. S.*, 208 F. 2d 329 (8th Cir. 1953), *cert. denied*, 347 U. S. 928 (1954); *U. S.* v. *Parmiter*, 173 F. Supp. 677, 687-89 (S. D. N. Y. 1959). But

in each of the cited cases the evidence was *uncontroverted* that the registrant was opposed to participation in war.[6] In such circumstances, reversal was proper because "a person's willingness to use force in self-defense is not a valid objection to denial of conscientious objector status *where other evidence of his opposition to participation in war because of religious belief is undisputed.*" *Taffs* v. *U. S.*, 208 F. 2d at 331. (Emphasis added.)

In this case, by contrast, the record is clear that there is no substance to any contention that Gearey's opposition to war was "undisputed." Indeed, the sincerity of his views was the very issue before the Board; and, it is clear from the testimony that many unquestionably valid considerations led the Board members to reject the genuineness of appellant's claim. For example, they observed Gearey's demeanor at the interview and testified that he seemed to be principally concerned with "furthering his education by going to Europe and taking pictures," and not with being reclassified as a conscientious objector. The members also stated that Gearey had refused to reveal his reasons for rejecting a teaching position at Bishop Ford High School which he had previously indicated he would accept, and that between June 7 and July 6, 1965 he denied, affirmed, and again denied that he was a member of the Catholic Church. Finally, the Board members were skeptical of Gearey's claim because of the entire untidy history of vacillation disclosed by his numerous requests for deferments over the 6-year period on diverse grounds, and his failure to seek reclassification as a conscientious objector until post induction notice. They were bolstered in their skep-

[6] In *Sicurella*, it was admitted that the registrant was sincere in his beliefs, and in all the other cases the defendants were Jehovah's Witnesses.

ticism by what they characterized as his "evasive" responses at the July 6 interview.

It is well established that the scope of judicial review in Selective Service cases is exceedingly narrow.[7]

> [I]t is not for the courts to sit as superdraft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson* v. *United States,* 346 U. S. 389, 396 (1953). The classification can be overturned only if it has "no basis in fact." *Estep* v. *United States,* 327 U. S. 114, 122 (1946).
>
> *Witmer* v. *U. S.,* 348 U. S. 375, 380-81.

The record before us supplies more than ample evidence to support the Board's conclusion that Gearey was not sincere in his belief; and in cases involving conscientious objectors, "any fact which casts doubt on the veracity of the registrant is relevant." *Witmer* v. *U. S.,* 348 U. S. at 381-82.

Moreover, we see no merit to Gearey's contention that his conviction must be reversed because the Board in deny-

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[7] 50 U. S. C. §460(b)(3) provides that decisions of the Local Boards are "final" except for administrative review. The Supreme Court has interpreted this finality to mean that:

> Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

U. S. v. *Seeger,* 380 U. S. 163, 185 (1965), quoting *Estep* v. *U. S.,* 327 U. S. 114, 112-23 (1946).

ing his claim *may* have relied to some extent on his answers regarding the use of force in self-defense. The decisions cited by appellant[8] are clearly inapposite; there judgments were reversed because there was a firm basis for believing that the registrant had been classified pursuant to a mistaken notion that his beliefs did not fall within the statutory standards for conscientious objection—in the various cases, the Department of Justice had incorrectly advised the Selective Service System that the registrant's beliefs did not qualify under the statute—and the reviewing court thus could not determine whether the denial of the registrant's claim was based upon a proper or an improper ground. We face no such quandary here, however, since we have no sufficient basis for believing that the Board utilized an improper standard in denying Gearey's claim; to the contrary we have the benefit of the testimony of the Board members revealing beyond question that valid considerations led to their rejection of Gearey's claim.

V.

Lastly, we consider Gearey's argument that the District Court erred by refusing to permit appellant to testify or to introduce in evidence the memorandum containing his recollections of the July 6 interview with the Board. We have already noted that this case was remanded for the limited purpose of determining whether the Board refused to consider Gearey's claim because it had been raised post Notice to Report for Induction. We cannot see the rele-

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[8] *Sicurella* v. *U. S., supra; U. S.* v. *Jakobson,* 325 F. 2d 409 (2d Cir. 1963), aff'd sub nom. *U. S.* v. *Seeger, supra; U. S.* v. *Kretchet,* 284 F. 2d 561 (9th Cir. 1960); *U. S.* v. *Ypparila,* 219 F. 2d 465 (10th Cir. 1954); *U. S.* v. *Shepherd,* 217 F. 2d 942 (9th Cir. 1954); *U. S.* v. *Hagaman,* 213 F. 2d 86 (3d Cir. 1954); *U. S.* v. *Erikson,* 149 F. Supp. 576 (S. D. N. Y. 1957).

vance of Gearey's testimony to this issue. Certainly, he could not reveal the *mens* or thought processes of the Board members.[9] And we cannot overlook the fact that despite intense cross-examination, the members remained steadfast in their assertion that Gearey's claim was considered on its merits and that they were prepared to reclassify him if deserving, but declined to do so because they believed his claim was not sincere.

The record reveals instead that counsel desired Gearey's testimony so that he could introduce the memorandum of the July 6 interview.[10] In any event, substantial portions of that document were placed before the Court during the

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[9] The following colloquy illustrates that Gearey was not prepared to so testify:

> Mr. Karpatkin: Well, I would like to say this first, your Honor. Obviously, I am aware of the unusual nature of this proceeding, as the rest of us are, and if your Honor is not prepared to grant the relief which I am going to ask you to grant either by this motion or application I want to argue before you, then I would want to put Mr. Gearey on the stand.
>
> The Court: Well, I would like to address myself to that now. I gathered from the various questions that you do propose to call him and to ask him the questions that were the basis really of the questions you asked the members of the Board. I take it you have in your possession some kind of memorandum he made which he says was his recollection of what transpired that evening. Whether he made it or not, I don't know. But it is that that you propose to have Mr. Gearey testify to, I guess?
>
> Mr. Karpatkin: Yes, your Honor.
>
> The Court: His recollection of what he remembers of what transpired on the evening of July 6th?
>
> Mr. Karpatkin: Yes, your Honor. [Record of Hearing at 194-95.]

Counsel's offer of proof at the first trial also reveals that appellant was not planning to testify as to the state of mind of the Board members. See Record of Trial at 95-99.

[10] "Mr. Karpatkin: May I respectfully say, your Honor, that I propose to call Mr. Gearey for the purpose of seeking to introduce into evidence a certain memorandum." Record of Hearing at 197.

cross-examination of the Board members. And since Gearey included the memorandum in his Appendix on this appeal, we have considered its contents as if the exhibit were in evidence. We see nothing in it, however, which would indicate that the Board members refused to give consideration to appellant's claim; rather, the document reveals that the members made a conscientious effort to determine whether Gearey's claim was genuine. And, the memorandum does not reveal that the Board had no basis upon which it could reasonably have concluded that appellant was not sincere in asserting a claim of conscientious objection. In these circumstances, we cannot say that the District Court's refusal to permit Gearey to testify at this limited hearing, or its failure to receive in evidence the memorandum, constituted reversible error.

We have considered appellant's other claims and find them equally lacking in merit.[11]

Judgment affirmed.

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[11] We reject, for example, appellant's argument that *U. S.* v. *Vincelli*, 215 F. 2d 210 (2d Cir. 1954), which we considered in the first *Gearey* case, stands for the principle that, upon the presentation of new information of a non-frivolous nature, the Board must reopen a registrant's classification, even if it decides to adhere to the prior classification. The cases cited by appellant, which have interpreted *Vincelli*, clearly indicate that the Board must reopen only if the registrant has made out a prima facie case, based on objective facts, that he is entitled to be reclassified. See, e.g., *U. S.* v. *Burlich*, 257 F. Supp. 906 (S. D. N. Y. 1966) (prima facie case that registrant was entitled to a hardship exemption). Gearey, however, made no such showing. Moreover, in the cases referred to by appellant, the request for reclassification was made *before* the registrant had been sent an induction notice, so that the Board had the power to reopen without a showing that "there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." 32 C. F. R. §1625.2.

We also decline to reconsider our prior holding that Gearey was not authorized to appeal, pursuant to §6(j), from the Board's adverse determination of his sincerity. See 368 F. 2d at 151.

2nd Court of Appeals Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of July one thousand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID ARTHUR GEAREY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

2nd District Court Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

April 17, 1967

No. 65 Cr. 828

UNITED STATES OF AMERICA,

v.

DAVID A. GEAREY,

Defendant.

Prosecution for failing to submit to induction into the armed forces. The United States District Court for the Southern District of New York, 260 F.Supp. 7, entered a judgment of conviction and the defendant appealed. The United States Court of Appeals for the 2nd Circuit, 368 F.2d 144, vacated and remanded for further proceedings. On remand, the District Court, Murphy, J., held that evidence adduced at hearing showed that local draft board in finding that defendant was not a genuine conscientious objector meant that he was not then and never had been a genuine conscientious objector, and there was a rational basis for this decision.

Conviction reinstated and sentence reimposed.

Robert M. Morgenthau, U. S. Atty., Southern District of New York, for plaintiff, Paul K. Rooney, Asst. U. S. Atty., of counsel.

Marvin Karpatkin, New York City, for defendant.

OPINION

MURPHY, *District Judge.*

The defendant was indicted for his wilful failure to submit to induction into the armed forces (50 App.U.S.C. §§ 451 et seq.). He waived a jury, was tried by the court and found guilty. Although no request for findings, Fed. R.Crim.P. 23(c), was made, the court filed its memorandum on March 14, 1966. United States v. Gearey, 260 F.Supp. 7 (S.D.N.Y. 1966). He was thereafter sentenced to a term of imprisonment of two years. On appeal, the Court of Appeals vacated the judgment of conviction and remanded for further proceedings. United States v. Gearey, 2 Cir., 368 F.2d 144 (2d Cir. 1966).

That court was disturbed over the form of the Local Board's finding that Gearey was not "a genuine c. o." It stated:

> "If the Board had found that Gearey's beliefs after the induction notice were no different than before, that would have sufficed, provided the judge found a rational basis for it. Again, if the Board had said clearly that in its view Gearey never had been and was not now 'a genuine c. o.,' that too would have sufficed, subject to the same proviso, since there could not be 'a change in the registrant's status resulting from circumstances over which the registrant had no control' if there had been no change at all. The Board's determination as to the sincerity of the claim, while ordinarily subject to an appeal with the safeguards of § 6(j), would not be in these circumstances because of the applicability of § 1625.2 to conscientious objector claims. While the Board's finding that Gearey was not

'a genuine c. o.' may have been a shorthand manner of expressing one or the other of the above views, it might also have meant that the Board was refusing to reopen on the ground that Gearey had not advanced his claim before the mailing of the induction notice, even though the claim had not matured until later.

"We see no reason, however, why the Board's failure to speak with pristine clarity should require dismissal of this indictment. A remand should enable the judge to ascertain from the Local Board precisely what it meant. * * * If it meant either that Gearey never was 'a genuine c. o.' or that whatever his beliefs were on the subject, they had matured before the induction notice was sent, and if the judge is convinced of the rationality of such a view, Gearey's conviction may stand; otherwise the indictment must be dismissed." 368 F.2d at 150-151.

Pursuant to such directions, a hearing was had on January 11th and 18, 1967, at which the testimony of the members of the Local Board was taken. (The transcript covers 202 pages). We are satisfied that the Board granted the interview to Gearey on July 6, 1965, in order to evaluate his application for a conscientious objector's classification and that they were prepared to honor his request for reclassification without regard to his outstanding induction order.

[1] From all the evidence adduced, we are satisfied that when the Local Board on July 6, 1955, found that Gearey was not "a genuine c. o.," it meant that he was not then, and never had been a genuine conscientious objector. We further find from this evidence and from the evidence adduced at the trial itself, that there was a rational basis for

this decision and, accordingly, reinstate his conviction and reimpose the same sentence as before, viz., that he be confined to the custody of the Attorney General for a period of two years.

Although such a finding renders moot the alternative ground outlined by the Court of Appeals for reinstating the defendant's conviction, i.e., if his beliefs matured before the induction notice was mailed to him, we are nonetheless satisfied that Gearey had long before made up his mind. In his letter of May 21, 1965, to the Board, he stated: "For the past several years I have been concerned with the problem of conscriptive service as it affects me. *Once* I resolved the problem in my own mind *I refrained from notifying the board* because I felt quite secure with my status as a student and I thought that I would have plenty of time to inform you after the completion of school." (Emphasis added).

[2] The members of the Local Board are ordinary citizens doing volunteer work for their country and, unfortunately, are not judges or even professional witnesses. Because they do not speak or write with pristine clarity is no reason to fault them. I found these board members to be honest, sincere, open-minded and without a trace of prejudice and recall "that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies." Witmer v. United States, 348 U.S. 375, 380-381, 75 S.Ct. 392, 395, 99 L.Ed. 428 (1955).

Finally, we refused to permit the defendant to testify as to his recollections of the interview on July 6, 1965, or to offer in evidence what is claimed to have been a memorandum of such recollections, on the ground that the directions of the Court of Appeals did not encompass such testimony or exhibit.

2nd District Court Judgment

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 65 Cr. 828

UNITED STATES OF AMERICA,

v.

DAVID ARTHUR GEAREY.

On this 17th day of April, 1967, came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant having been convicted upon his plea of not guilty and a finding of guilty by the Court, defendant having waived trial by jury of the offense of unlawfully, wilfully and knowingly, upon reporting for induction pursuant to an Order to Report for Induction mailed to him by his Local Board, failing, neglecting and refusing to submit to induction into the Armed Forces of the United States. (Title 50, Appendix, U.S. Code, Section 462(a); 32 Code of Federal Regulations, Section 1632.14)

and

the judgment of April 19, 1966 having been vacated by the United States Court of Appeals and remanded to the District Court for further proceedings,

IT IS ADJUDGED, after further proceedings in this Court, that the verdict of guilty and sentence imposed on April 19, 1966 be reinstated, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years.

Defendant continued on bail pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

THOMAS F. MURPHY
United States District Judge.

JOHN J. OLEAR, JR.
Clerk

1st Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Argued September 29, 1966—Decided October 21, 1966.

No. 86, Docket 30551

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID ARTHUR GEAREY,

Appellant.

Appeal from judgment of conviction for failing to submit for induction into armed forces in violation of 50 U.S.C. App. § 462(a), after a trial without a jury before Thomas F. Murphy, J., in the United States District Court for the Southern District of New York. The Court of Appeals, Kaufman, Circuit Judge, held that if the local board's determination that defendant was not a genuine conscientious objector meant that defendant had never been one or that whatever his beliefs were on the subject, they had matured before induction notice was sent, conviction would stand, otherwise indictment must be dismissed.

Vacated and remanded for further proceedings.

Marvin M. Karpatkin, of Karpatkin, Ohrenstein & Karpatkin, New York City, for appellant.

Paul K. Rooney, Asst. U. S. Atty. (Robert M. Morgenthau, U. S. Atty., for S. D. New York; Richard A. Givens, Asst. U. S. Atty., on the brief), for appellee.

Before LUMBARD, *Chief Judge*, FRIENDLY and KAUFMAN, *Circuit Judges*.

KAUFMAN, *Circuit Judge*:

The military conflict which now engages the nation has prompted much debate over our system of conscription. This controversy has been manifest not only in Congressional hearings, but also in numerous judicial proceedings in which the draft laws have been challenged. Probably no provisions have been examined more closely than those relating to the deferment of conscientious objectors.[1]

David Arthur Gearey was convicted of violating 50 U.S.C.App. § 462(a)[2] because of his refusal to submit to

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[1] See, e.g., United States v. Seeger, 380 U. S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965), in which a unanimous Court held that the belief in a "Supreme Being" required of those claiming to be conscientious objectors, was the "sincere and meaningful belief which occupies in the life of the possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption." Id. at 176, 85 S. Ct. at 859. See also United States v. Jakobson, 325 F. 2d 409 (2d Cir. 1963), affirmed sub nom., United States v. Seeger, supra.

[2] "[A]ny person who * * * evades or refuses registration or service in the armed forces or any of the requirements of this title * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this title * * * or rules, regulations, or directions made pursuant to this title * * * shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than 5 years or a fine of not more than $10,000, or by both such fine and imprisonment * * *"

Regulation § 1632.14 provides:

(a) When the local board mails to a registrant an Order to Report for Induction * * * it shall be the duty of the registrant to report for induction at the time and place fixed in such order. * * *

(b) Upon reporting for induction, it shall be the duty of the registrant * * * (5) to submit to induction * * *.

induction as ordered by his Local Selective Service Board. On this appeal, his principal contention is that although his claim of conscientious objection was not raised prior to receiving a Notice to Report for Induction (SSS Form No. 252), he was nevertheless entitled to the procedural safeguards provided for those claiming to be conscientious objectors in section 6(j) of the Universal Military Training and Service Act, 50 U.S.C.App. § 456(j).

In October 1960, upon attaining the age of 18, Gearey registered with his local draft board as required by law. He did not at that time request a draft exemption as a conscientious objector. Subsequently, he was granted a student deferment (2-S) because of his attendance at St. Francis College in Brooklyn. In November 1964, he was reclassified 1-A (available for military service) when his Local Board learned that he was no longer enrolled as a college student, except for a three credit part-time course at the New School for Social Research. Gearey was ordered to report for pre-induction physical examinations, and on January 4, 1965 he was notified of his acceptability for military service. The following day the Local Board voted not be reconsider Gearey's classification despite his claim that he planned to resume full-time studies in February. Notified of this decision, Gearey wrote to the Board in late January and requested a hearing to discuss his student status. This was granted, and on February 2, 1965 he appeared before the Board with evidence of attendance at a school for motion picture arts and a claim that he planned to re-register at St. Francis College. The Board reclassified Gearey 2-A and directed him to have St. Francis forward proof of his matriculation. The college, however, informed the Board in mid-February that Gearey was no longer a student, and

when he failed to supply the Board with evidence of attendance, he was reclassified 1-A on April 6, 1965. An Order to Report for Induction was mailed on April 19, but four days later the Board received a letter from Gearey requesting that his classification be reviewed[3] and that his date of induction be postponed from May 5 until the end of his spring term at school. The Board deferred his induction and rescheduled it for July. On May 24, Gearey for the first time asked the Local Board to send the special questionnaire for conscientious objectors (SSS Form No. 150). After the questionnaire was returned, the Board invited Gearey to appear for an interview on July 6, and at the same time notified him that the date of his induction was scheduled for July 8. Upon the conclusion of the July 6 hearing, the Board informed Gearey that it believed he was not a "genuine c. o." and that the facts did not warrant a change in his classification.[4] Gearey reported for induction on July 8, 1965 but refused to take the symbolic step forward and was promptly arrested. At his trial before Judge Thomas F. Murphy, sitting without a jury, Gearey

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[3] Gearey stated he would submit proof of attendance at City College and the School of Motion Picture Arts.

[4] The Local Board recorded the following summary of its July 6 hearing with Gearey:

> Registrant interviewed, had decided just recently to become a c.o., said he had been thinking about it but never mentioned it. We reviewed the c.o. #150, also reviewed letter sent by Bishop Ford High School. Registrant claims he is not working there nor that he would definitely be working there in September. Said he would like to go to Europe and take pictures since this is the vocation he wants to pursue or maybe teach when he returns. The board after reviewing the evidence submitted and registrant's claims felt he did not qualify to be a genuine c.o. All facts considered did not warrant a change in classification. He was advised to report as scheduled. Vote was 4 to 0.

was adjudged guilty of failing to submit to induction into the armed forces, and was sentenced to imprisonment for two years.

Early in our nation's history, the government recognized the moral conflict which confronted the members of certain religious sects when they were called to bear arms. Originally, the states were principally in control of conscription, and soon established a pattern of exempting conscientious objectors.[5] When the federal government took control of conscription during the Civil War, this practice was continued.[6] Selective Service System Monograph No. 10, Conscientious Objection 39-41 (1950). During the First World War, the Draft Act of 1917, 40 Stat. 76, 78, required all eligible persons to serve in the armed forces, but permitted conscientious objectors to perform noncombatant duties.

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[5] Among the original 13 Colonies, Massachusetts (1661), Rhode Island (1673), and Pennsylvania (1757), were the first to provide exemptions from combatant services for conscientious objectors. The Pennsylvania legislation, for example, provided that:

> All Quakers, Mennonites, Moravians, and others conscientiously scrupulous of bearing arms, who shall appear on any alarm with the militia, though without arms, and obey the commands of the officers in extinguishing fires, suppressing insurrection of Slaves or other evil-minded persons during an attack, in caring for founded, conveying intelligence as expresses or messengers, carrying refreshments to such as are on duty, and in conveying to places of safety women and children, aged, infirm, and wounded persons, are free and exempt from the penalties of the act.

Selective Service System Monograph No. 11, Conscientious Objection 30 (1950).

[6] The treatment of conscientious objectors in the Confederacy was generally parallel to that in the North. One interesting proposal was made in North Carolina in the early days of the Civil War before the Confederate Government had assumed complete control of conscription. It was suggested that conscientious objectors work in the state's salt mines as an alternative to service in the armed forces. Ibid.

Id. at 54-55. A somewhat similar pattern was adopted by Congress in 1940 in the Selective Training and Service Act, 54 Stat. 889, and again in 1948 when the present draft law, the Universal Military Training and Service Act, was passed. Section 6(j) of the UMT&S Act, 50 U.S.C.App. § 456(j), provides that:

> Nothing contained in this title * * * shall be construed to require that any person be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned and such person shall be notified of the time and place of such hearing. * * * If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board.

[1, 2] The obvious purpose of the statutory scheme which provides for intervention by the Justice Department

into the Selective Service appeal procedure, is to furnish a fount of information concerning an appellant's conscientious objection claim to the Appeal Board, so that a careful and enlightened decision can be reached. The Department's recommendation is based not only on the hearing which it conducts, but also on the report it receives from the FBI concerning the accuracy and sincerity of the applicant's claim. The Justice Department's role in the appeal procedure serves another purpose. It introduces into the inquiry a government agency less intimately associated with the armed forces than the Selective Service System, and not as concerned with meeting fixed quota calls. As a result, a more objective and disinterested approach to granting exemptions can be expected. While it is true that the Department's recommendation is not binding on an Appeal Board, it is unquestionably a significant factor not only in the Board's final determination, but also in any decision that the President may ultimately reach if the case is referred to him.[7]

Gearey vigorously urges on this appeal that he was improperly denied the procedural safeguards in Section 6(j) for taking an appeal from the Local Board's determination that he was not a "genuine c. o." The denial by the Local

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[7] In addition to being notified of the time and place of the Justice Department hearing, the applicant is given the opportunity to be heard, 32 C. F. R. § 1625.25(d); to receive a fair resume of the FBI report, Simmons v. United States, 348 U. S. 397, 75 S. Ct. 397, 99 L. Ed. 453 (1955), and a copy of the Justice Department recommendation, Gonzales v. United States, 348 U. S. 407, 75 S. Ct. 409, 99 L. Ed. 467 (1955); 32 C. F. R. § 1625.25(e); and to file with the Appeal Board a written reply to the recommendation, 32 C. F. R. § 1625.25(e). In certain cases the decision of the Appeal Board may be reviewed by the President, 32 C. F. R. § 1627.1.

Board was based upon its interpretation of 32 C.F.R. § 1625.2[8] which provides:

> The local board may reopen and reclassify anew the classification of the registrant * * * provided * * * *the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in registrant's status resulting from circumstances over which the registrant had no control.* 32 C.F.R. § 1625.2 (emphasis added).

[3, 4] The statutory authorization for this regulation is found in 50 U.S.C. App. § 460, which provides that the President may "prescribe the necessary rules and regulations to carry out the provisions of this title," and § 1625.2 in our view is clearly within the bounds of that grant of power. We can see no sound reason why a regulation may not require that claims for deferment should be advanced as soon as they have matured. If young men eligible for the draft are permitted endlessly to challenge their status and to claim review of adverse determinations, the effect on the Selective Service System would be chaotic for manpower quotas could rarely be met with any degree of certainty. This is especially true when the claim for deferment is based on a conscientious objection since a protracted proc-

[8] In 1942, 2 years after the Selective Service Training Act became law, the President promulgated § 626.2 of the Code of Federal Regulations, which was substantially similar to what is today § 1625.2. When Congress passed § 6(j) in 1948, the Report of the Senate Armed Services Committee stated only that "This section reenacts substantially the same provisions as were found in subsection 5(g) of the 1940 act." S. Rep. No. 1268, 80th Cong., 2d Sess. 14.

ess of Justice Department investigation and hearing is required. Years of experience have demonstrated that it is necessary and reasonable to set limits on the time in which a claim must be asserted in the litigation which floods our courts; so, too, it is essential and proper for an administrative agency, particularly one as large and complex as the Selective Service System, to require that claims be raised within reasonable time limits or be forfeited. We hold, therefore, as applied to applicants whose conscientious objections matured prior to receipt of an Order to Report for Induction, § 1625.2 is wholly justified as part of an orderly administrative process.[9] These objectors have have not had "a change in * * * status resulting from circumstances over which * * * [they] had no control." They have had ample opportunity to raise their claim of conscientious objection before an induction notice was sent, and they cannot justly complain that the Local Board refused to reopen their classifications.

[5, 7] The considerations are quite different, however, when a claim of conscientious objection, raised for the first time after receipt of an induction notice, is based on a claim which had not previously matured. Section 6(j) does not set any time limit by which an applicant's conscientious objections must fully crystallize in his mind. It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen

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[9] A similar conclusion has been reached by other Circuits. See United States v. Taylor, 351 F. 2d 228 (6 Cir. 1965); United States v. Beaver, 309 F. 2d 273 (4 Cir.), cert. denied, 371 U. S. 951, 83 S. Ct. 505, 9 L. Ed. 2d 499 (1963); Boyd v. United States, 269 F. 2d 607 (9 Cir. 1959); Keene v. United States, 266 F. 2d 378 (10 Cir. 1959); United States v. Schoebel, 201 F. 2d 31 (7 Cir. 1953).

until after he received his notice,[10] although the belatedness of a claim may be a factor in assessing its genuineness. See Clancy & Weiss, "The Conscientious Objector Exemption," 17 Maine L.Rev. 143, 147 (1965); Note, "Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption," 72 Yale L.J. 1459, 1462 (1963). The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments. The long history of exempting conscientious objectors, coupled with the specific *statutory* right of appeal, indicate to us a strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors, and indeed to grant deferments in appropriate cases. Implementation of that policy requires that any individual who raises his conscientious objector claim promptly after it matures—even if this occurs after an induction notice is sent but before actual induction—be entitled to have his application considered by the Local Board.[11] In light of this, the Local Board

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[10] The Defense Department has recognized that a genuine claim of conscientious objection may arise even *after induction*. The various military services have therefore provided procedures for investigating such claims, and in appropriate cases for granting discharges. See Department of Defense Directive No. 1300.6, ASD (M) (Aug. 21, 1962); Army Regulation No. 635-20 (Nov. 9, 1962); Department of the Navy, Bupers Instruction 1616.6 (Nov. 15, 1962); Marine Corps Order 1306.16A (Oct. 16, 1962); Air Force Regulation No. 35-24 (March 8, 1963).

[11] Any other conclusion would result in the anomalous situation that individuals whose claims of conscientious objection mature either prior to receipt of a notice of induction or after induction itself, would be permitted to apply for deferment, while those whose beliefs formed during the interim period, would not be able to properly raise their claims. It would appear this is so because Department of Defense Directive No. 1300.6 states:

> Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed

must first determine when an applicant's beliefs matured. If the Board properly concludes that the claim existed before the notice was sent, the classification may not be reopened.[12] If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector then a change in status would have occurred "resulting from circumstances over which the registrant had no control," and he would be entitled to be reclassified by the Local Board.[13]

[8] While action by the Local Boards in accordance with this interpretation of the Regulation should avoid difficulty in the future, it remains to apply these principles to Gearey's case. The difficulty arises from the form of the Board's finding. If the Board had found that Gearey's beliefs after the induction notice were no different than

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prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained.

[12] This result is dictated not only by § 1625.2, but in most cases by § 1625.1(b) as well. "Each classified registrant and person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification * * *." 32 C. F. R. § 1625.1(6). See Keene v. United States, supra, 266 F. 2d at 384. In United States v. Corliss, 280 F. 2d 808, 812, cert. denied, 364 U. S. 884, 81 S. Ct. 167, 5 L. Ed. 2d 105 (1960), we inferentially approved the application of that section to conscientious objector claims.

[13] See Keene v. United States, 266 F. 2d 378, 384 (1959). But see United States v. Taylor, 351 F. 2d 228 (6 Cir. 1965); Boyd v. United States, 269 F. 2d 607 (9 Cir. 1959); United States v. Schoebel, 201 F. 2d 31 (7 Cir. 1953).

before, that would have sufficed, provided the judge found a rational basis for it. Again, if the Board had said clearly that in its view Gearey never had been and was not now "a genuine c. o.," that too would have sufficed, subject to the same proviso, since there could not be "a change in the registrant's status resulting from circumstances over which the registrant had no control" if there had been no change at all. The Board's determination as to the sincerity of the claim, while ordinarily subject to an appeal with the safeguards of § 6(j), would not be in these circumstances because of the applicability of § 1625.2 to conscientious objector claims. While the Board's finding that Gearey was not "a genuine c. o." may have been a shorthand manner of expressing one or the other of the above views, it might also have meant that the Board was refusing to reopen on the ground that Gearey had not advanced his claim before the mailing of the induction notice, even though the claim had not matured until later.

[9] We see no reason, however, why the Board's failure to speak with pristine clarity should require dismissal of this indictment. A remand should enable the judge to ascertain from the Local Board precisely what it meant. Compare United States v. Jakobson, supra, 325 F.2d at 417; United States v. Balogh, 157 F.2d 939, 944 (2 Cir. 1946), judgment vacated on other grounds, 329 U.S. 692, 67 S.Ct. 525, 91 L.Ed. 605 (1947). If it meant either that Gearey never was "a genuine c. o." or that whatever his beliefs were on the subject, they had matured before the induction notice was sent, and if the judge is convinced of the rationality of such a view, Gearey's conviction may stand;[14] otherwise the indictment must be dismissed.

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[14] The only objection to this course—that if Gearey had been clearly told of the Local Board's position, he might have submitted to induction—would be wholly inconsistent with the record of his insistence on pressing his claim at all costs.

[10, 11] Of the other grounds for reversal presented by appellant, only one merits discussion. Relying on United States v. Vincelli, 215 F.2d 210 (1954), Gearey argues that the law in this Circuit is that the Local Board reopens an applicant's classification—entitling him to a personal appearance and an appeal[15]—when it sends him a conscientious objector form. To understand why this is not the law, an earlier decision by this Court must be examined. In United States v. Packer, 2 Cir., 200 F.2d 540 (1952), appellant had requested a conscientious objector form after receiving his notice of induction. A letter from the Regional Director of the Selective Service to the Local Board suggested that Packer's classification had been reopened when the Board sent the form, and Packer was therefore allowed to proceed to the Appeal Board. This Court later reversed a conviction for failure to submit to induction, because at his hearing before the Department of Justice Packer had been denied the right to examine the FBI report. In arriving at its decision, the Court held that the letter from the Regional Director *and the appeal* that packer was given, constituted a reopening which prevented the Government from contending that the applicant had waived his rights. The Supreme Court, however, reversed our decision on the ground that the refusal to allow Packer to see the FBI report did not amount to a violation of due process. United States v. Packer, reversed sub nom., United States v. Nugent, 346 U.S. 1, 73 S.Ct. 991, 97 L.Ed. 1417 (1953). The reopening question

[15] If a classification is reopened, the Local Board must cancel any Order to Report for Induction, 32 C. F. R. § 1625.14, and must reclassify the registrant, 32 C. F. R. § 1625.11. The registrant is then entitled to a notice of his reclassification, 32 C. F. R. § 1625.12, and to an appearance before the Local Board and an appeal from its decision, 32 C. F. R. § 1625.13.

was not passed upon. Six years later, however, in United States v. Vincelli, supra, a panel of this Court citing our earlier holding in *Packer*, held that sending a form constituted a reopening. On rehearing, though, 216 F.2d 681 (1954), two of the judges indicated that the Supreme Court's decision in *Nugent* had interpreted the law otherwise. We believe their view is the proper one, for had the Supreme Court decided that there had been a reopening, it would necessarily have affirmed our decision in *Packer* on the ground that appellant had been denied his basic statutory right to a personal appearance before the Local Board and to an appeal. By reversing, however, the Court inferentially indicated its view that sending a conscientious objector questionnaire is not, *ipso facto*, a reopening of the registrant's classification.

Vacated and remanded for further proceedings.

1st Court of Appeals Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of October one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

DAVID ARTHUR GEAREY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is vacated and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

1st District Court Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 828

UNITED STATES OF AMERICA,

—against—

DAVID ARTHUR GEAREY,

Defendant.

MURPHY, *D.J.*

Defendant waived a jury and was tried by the court on February 16 and March 1, 1966, on an indictment charging him with knowingly refusing to submit to induction into the Armed Forces of the United States pursuant to the Universal Military Training and Service Act, 50 App. U.S.C. §451, et seq., in violation of 50 App. U.S.C. §462(a) and 32 C.F.R. §1632.14. On the last mentioned date he was found guilty by the court. Although not requested to find the facts specially pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure, we believe it desirable to do so.

In 1960 defendant registered with his local draft board. On November 14, 1961, he was classified 1-A but upon receiving notice from St. Francis College that the defendant was attending that institution and pursuing a normal course of study in his sophomore year, the local board reclassified

the defendant 2-S. This last classification continued through June, 1964, when the defendant was to graduate. On November 5, 1964, he was again reclassified 1-A and on November 24, 1964, was ordered to report for a pre-induction physical on December 18, 1964. On December 7, 1964, the board received a letter from the defendant dated November 30th advising that he was taking three credits to fulfill his course requirements for a B.A. degree which he would receive in January of 1965, and that he expected to return to school full time in February to pursue a Master's Degree.[1] The pre-induction physical was had and on January 4, 1965, a notice of acceptability was mailed to the defendant. On January 5, 1965, the local board reviewed the file in light of the defendant's correspondence and voted "no change." Notification was sent on January 6, 1965. On January 19, 1965, the local board received a letter from the defendant wherein the latter advised that he had registered in one school and was "in the process of registering at another college in the area of Cinematography;" he expressed his belief that he would be entitled to a student deferment upon beginning studies at both schools and stated that he "would like to apply for a hearing . . . in order to discuss my status as a student." On the same day, the board directed the defendant to report for an interview. On February 2, 1965, the board interviewed the defendant; the minutes reflect the following:

> "Registrant appeared with evidence of attendance at a School for Motion Picture Arts and asked us to defer him so that he could finish his seminar. Also claimed

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[1] The board had received on October 13, 1964, a communication from the New School for Social Research advising that the defendant had been admitted as a non-matriculating student in "part time course of instruction for the fall 1964 semester. (3 credits)."

he would reregister at St. Francis and was asked to have St. Francis forward to the Board evidence of such attendance. A vote was taken and registrant was classified 2S."

On February 18, 1965, the board received a communication from St. Francis College advising that the defendant was no longer in attendance there. A request for evidence of attendance was immediately mailed to the defendant. On April 6, 1965, nothing having transpired in the meantime, the board voted and reclassified defendant 1-A and sent him notice the next day. On April 19, 1965, the board mailed the defendant an Order to Report for Induction on May 5, 1965. On April 23, 1965, the board received a letter from the defendant, dated April 21st, wherein the defendant acknowledged receipt of the notice of his classification and the induction order; he acknowledged also that he was aware that he had not appealed within the prescribed time; he asked, however, that the board "defer my impending draft notice and review my classification as a student, at least until the termination of this term;" he indicated that he was prepared to submit proof of attendance at City College, in addition to the School of Motion Picture Arts. On the day his letter was received the defendant was mailed a request for proof of attendance, notified his induction was postponed until July, and advised for the future to notify his local board of any change in status within ten days of its occurrence.

On May 24, 1965, the local board received a letter dated May 21st from the defendant which stated as follows:

"For the past several years, I have been concerned with the problem of the conscriptive service as it effects me.

I have tried to work out the problem in my own mind and have occasionally discussed it with friends. I realized that if and when I came to the draft board, I would not be in a position to discuss the problem with you, rather, I would have to confront the board with my feelings and beliefs. Once I had resolved the problem in my own mind, I refrained from notifying the board because I felt quite secure with my status as a student, and I thought that I would have plenty of time to inform you after completion of school. However, my recent call to the service has rocked me out of that lethargy, and cured me of my procrastination. Therefore, I am requesting the necessary papers required in order that I may legally apply for the classification of conscientious objector."

The form for conscientious objectors was sent to the defendant the same day, to be returned on or before June 4, 1965. It was received completed on June 7, 1965. On June 17, 1965, the board wrote the defendant to report for an interview on July 6, 1965, and on the same day notified him on the appropriate form that his induction date was July 8, 1965. On July 1, 1965, the board received a letter from the defendant, dated June 29, 1965, wherein he stated that he would like to change his answer to that question on the conscientious objector's form which asked if he was a member of a religious sect or organization from "no" to "yes," and advised that he was a baptized member of the Catholic Church, and expressed his opinion that "membership in the Catholic Church does not contradict anything I may claim as an objector." On July 2, 1965, the board received a letter dated July 1, 1965, from the principal of Bishop Ford High School wherein it was stated that the defendant

had been hired to teach at that institution as of June, 1965, apparently to commence teaching in the fall. On July 6, 1965, the defendant was interviewed by his local board which recorded the following:

> "Registrant interviewed, had decided just recently to become a c.o., said he had been thinking about it but never mentioned it. We reviewed the c.o. form #150, also reviewed letter sent by Bishop Ford High School. Registrant claims he is not working there nor that he would be definitely working there in September. Said he would like to go to Europe and take pictures since this is the vocation he wants to pursue or maybe teach when he returns. The board after reviewing the evidence submitted and registrant's claims felt he did not qualify to be a genuine c.o. All facts considered did not warrant a change in classification. He was advised to report as scheduled. Vote was 4 to 0."

On July 8, 1965, the defendant apeared at his induction center but refused to be inducted.

The Universal Military Training and Service Act contains an exemption from combatant training and service for conscientious objectors which provides, in pertinent part:

> "Nothing contained in this title . . . shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appro-

priate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing." 50 App. U.S.C. §456(j).

The statute does not limit the time within which the claim must be made but the Code of Federal Regulations under which the Act is administered prescribes the classification procedure. Thus, after a registrant is notified of his classification, he may, within ten days, either appeal the classification to an appeal board, 32 C.F.R. §1626.1 et seq., or request a personal appearance before his local board, §1624.1(a). If he elects to follow the latter course, the board may reopen and reclassify the registrant, or refuse to reopen, §1624.2(c), and in either case, the registrant is again entitled to notice of the decision, §1624.2(d) and has the same right of appeal as in the case of the original classification, §1624.2(e). Further, should some fact occur which might result in a different classification, the registrant is required to report such fact within ten days after its occurrence, §1625.1(b). The board is empowered to reopen the registrant's classification upon a written request presenting facts not previously considered, which, if true, would justify a change in classification, *provided, however,* "the classification . . . shall not be reopened after the local board has mailed . . . an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control," §1625.2. If a registrant's request fails to present facts not previously considered, or such facts are presented but the local board is of the opinion that, if true, they would not justify a change in the registrant's classification, it shall not

reopen the classification, §1625.4. But once a local board does reopen a classification, it shall again classify the registrant in the same manner as if he had never before been classified, even though he be given the same classification, and cancel any outstanding Order to Report for Induction. §1625.11-1625.14.

In the instant case the defendant did not, within the time limits prescribed, request a personal appearance under §1624.1(a) or appeal under §1626.1 et seq., from the classification of April 6, 1965, which resulted in an Order to Report for Induction. It wasn't until more than a month later, and until after he had secured a postponement of his induction date that he first raised the claim of conscientious objections. It is, however, defendant's initial contention that he cannot be deprived of his statutory exemption or his right to appeal a denial of the exemption by §1625.2 of the regulations. We do not agree.

That part of 32 C.F.R. §1625.2 proscribing a reopening after an Order to Report for Induction has been mailed unless the local board "first specifically finds . . . a change in . . . status resulting from circumstances over which the registrant had no control" does not specifically require that the change, if it exists, must have occurred subsequent to the Order to Report for Induction, but we are persuaded that the weight of authority is to the effect that where conscientious objections mature prior to the mailing of the Order to Report for Induction, §1625.2 effectively restricts the exemption granted in 50 App. U.S.C. §456(j). United States v. Taylor, 351 F.2d 228 (6th Cir. 1965); United States v. Beaver, 309 F. 2d 273 (4th Cir. 1962) cert. denied, 371 U.S. 951 (1963); Keene v. United States, 266 F.2d 378 (10th Cir. 1959); United States v. Vincelli, 216 F.2d 681, 682 (2d

Cir. 1954), (dictum). We do not regard United States v. Clark, 105 F.Supp. 613 (W.D.Pa. 1952) and United States ex rel. Berman v. Craig, 207 F.2d 888 (3d Cir. 1953) as contra to, but as limiting this proposition since in *Clark* the Order to Report for Induction was mailed before the registrant's time to appeal the board's refusal to reopen had expired, §1626.2, and in *Berman* the Order to Report for Induction was mailed prior to the expiration of ten days since the change in status had occurred, §1625.1(b).

Where, however, the conscientious objections mature subsequent to the mailing of the Order to Report for Induction there are differing opinions as to whether the accession of conscientious objections can qualify as a change in status over which the registrant had no control. Those courts which think not, have upheld determinations not to reopen by local boards. United States v. Porter, 314 F. 2d 833, 836 (7th Cir. 1963); Boyd v. United States, 269 F. 2d 607, 610 (9th Cir. 1959); United States v. Schoebel, 201 F.2d 31, 32-33 (7th Cir. 1953).

We disagree with those courts on this point. The accession of beliefs which require one to put forth conscientious objections is, in our opinion, a change of status. We do not believe the change to be one over which a registrant has *no* control, but are not inclined to believe that the regulation should operate to penalize a registrant for not earlier acceding to ideas not yet solidified in his mind or to compel exercise of his free will to reject what to him have become indisputable truths. At least one court supports the applicability of the "change of status" provision of §1625.2 to claims of conscientious objectors and has concluded therefore that should it be a fact that the objections matured subsequent to the Order to Report for Induction, reopening and reclassification are required. United States v. Keene,

supra, 266 F. 2d at 384. It follows that a local board must give consideration to such a claim before determining not to reopen.

In the instant case the local board did consider the defendant's claim of having acquired conscientious objections and of having acquired them subsequent to the Order to Report for Induction. The board interviewed the defendant in person. It had before it defendant's letter of May 21, 1965, wherein the claim was raised for the first time; it had before it the conscientious objector's form completed by the defendant; it had before it defendant's letter of June 29, 1965, wherein he corrected an answer to a question on the conscientious objector's form and explained why he had first answered as he had and why he felt he could be both a Roman Catholic and a conscientious objector. And, not least in importance, it had before it defendant's classification history. After completing his attendance at St. Francis in pursuit of a B.A. degree, defendant's next request for a deferment (letter of November 30, 1965) was based on his status as a student. This claimed status was also the basis of his requests of January-February, 1965 (which resulted in a deferment) and of April, 1965 (which resulted in a postponement of induction). It was not until he had apparently exhausted his chances of further deferment or postponement on this ground that he interposed the claim of conscientious objections. While it is defendant's claim that his objections matured after the Order to Report for Induction, neither we nor the board were required to ignore this chronology. "Sudden accessions of belief may be utterly sincere, as the memorable one on the Damascus Road; but they seldom synchronize so perfectly . . . with external facts making them convenient, and they normally manifest themselves in

expressions more deeply personal. . . ." United States v. Corliss, 280 F. 2d 808, 812 (2d Cir. 1960) cert. denied 364 U. S. 884 (1960). The local board apparently found not that the objections matured either before or after the Order to Report for Induction but that the defendant was not a genuine conscientious objector. In effect, it found that there was no "change in status," or, in terms of the regulation, it did not "first specifically find . . . a change in . . . status." We have read the entire file and are unable to conclude that the board's failure to so find was without any basis in fact. Cf. United States v. Jakobson, 325 F.2d 409, 412 (2d Cir. 1963) aff'd 380 U.S. 163 (1965), and the cases cited therein. Accordingly, the board had no power to reopen the defendant's classification. 32 C.F.R. §1625.2.

We understand that the effect here given §1625.2 deprives the defendant of administrative review of the local board's action. But we see in this no greater restriction on 50 App. U.S.C. §456 (j) than occurs when the conscientious objections mature prior to the Order to Report for Induction and are interposed subsequently. United States v. Taylor, supra; United States v. Beaver, supra; Keene v. United States, supra; United States v. Vincelli, supra.

We should also make mention of United States v. Underwood, 151 F. Supp. 874 (E.D.Pa. 1955) and United States v. Crawford, 119 F.Supp. 729 (N.D. Cal. 1954) cited by defendant. We feel that these cases can be distinguished in that in neither did the local board even consider the claims; but insofar as they are not distinguishable, see Boyd v. United States, supra, 269 F. 2d at 612.

It is next argued that the board's action in sending, receiving and reviewing the conscientious objector's form, and in interviewing the defendant constituted a reopening which entitled the defendant to a cancellation of the Order to Re-

port for Induction and to all rights of a newly classified registrant, 32 C.F.R. §§1625.11-1625.14. We do not reach the question of whether §1625.2 can be claimed after a board in fact does reopen since we find no such fact here. The board was required to send the form when it was requested, 32 C.F.R. §1621.11. The defendant had no procedural right to a hearing, as exists where there is timely request after a classification, §1624.1(a), but the interview was one of the factors we considered in determining whether the board gave the required consideration to the claim. By requiring, as we do, the board to look into a claim of conscientious objections interposed after the Order to Report for Induction to determine whether there has been a change in status which warrants a reopening, and to hold, as we are asked, that this consideration itself amounts to a reopening would in effect compel reopening whenever a claim of conscientious objections is interposed. We have already expressed our views on the efficacy of §1625.2. See also United States v. Beaver, supra, 309 F. 2d at 277; Boyd v. United States, supra, 269 F.2d at 610. Defendant's reliance on United States v. Vincelli, 215 F. 2d 210, 212-213 (2d Cir. 1954) is misplaced. That case, which relied on *dictum* in a subsequently overruled case, United States v. Racker, 200 F. 2d 540, 541 (2d Cir. 1952), rev'd 346 U.S. 1 (1953), is factually distinguishable. See the opinion in the *Vincelli* case on the petition for rehearing, 216 F. 2d 681, 682.

Defendant's final argument is that he was denied procedural due process by the board's failure to send written notification of its decision not to reopen as required by §1625.4, which regulation, defendant assumes, applies in every case where the board decides not to reopen. We are not certain the premise is valid. Section 1625.4, insofar as

it is pertinent here, requires notice where the board refuses to reopen because it is of the opinion that the facts alleged, if true, *would not* justify a change of classification. The new fact alleged by the defendant was the accession of conscientious objections. If true this *would* indeed compel a change in classification. Thus it appears the board did not act under §1625.4 and that that regulation is not applicable. But see United States v. Beaver, supra, 309 F. 2d at 277, where the board's decision was couched in the language of §1625.2, and the court assumed the applicability of §1625.4. Also, it may be argued that the new facts alleged by the defendant was not his status as a conscientious objector but his particular beliefs, and that the board's decision was that such beliefs, if they existed, would not constitute conscientious objections within the meaning of §456(j), bringing the board's decision within the language of §1625.4. Assuming arguendo, that for one reason or another the defendant was entitled to notice under §1625.4, we are not convinced that the defendant was so deprived as to require acquittal. In *Beaver,* instead of notice of the board's determination, the defendant was sent a letter advising him when to report for induction, which had theretofore been postponed. The court held this to fulfill the notice requirement of §1625.4. In the instant case defendant was told by the board of its decision at the conclusion of the interview of July 6, 1965, and that he was required to report for induction as previously directed. We see no deprivation which requires acquittal.

In accordance with our findings and conclusions as are herein expressed we found the defendant guilty.

THOMAS F. MURPHY
U.S.D.J.

Dated, New York, N. Y., March 14, 1966.

1st District Court Judgment

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

No. 65 Cr. 828

UNITED STATES OF AMERICA

v.

DAVID ARTHUR GEAREY

On this 19th day of April, 1966 came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a finding of Guilty by the Court, the defendant having waived trial by jury of the offense of unlawfully and knowingly, upon reporting for induction pursuant to an Order to Report of Induction mailed to him by his Local Board, failing, neglecting and refusing to submit to induction into the Armed Forces of the United States (Title 50, Appendix, U.S. Code, Section 462(a); 32 Code of Federal Regulations, Section 1632.14) as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years.

The defendant is continued in the custody of his attorney until April 20, 1966 on which date he shall post bail pending appeal fixed in the sum of $2,000.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

THOMAS F. MURPHY
United States District Judge.

John J. Clear, Jr.
Clerk.

Regulations

Title 32, Code of Federal Regulations

§1625.2 When registrant's classification may be reopened and considered anew.

"The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

§1625.4 Refusal to reopen and consider anew registrant's classification.

"When a registrant, any person who claims to be a dependent of a registrant, any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, or the government appeal agent files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required."

§1625.11 Classification considered anew when reopened.

"When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened."

§1625.12 Notice of action when classification considered anew.

"When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of §1623.4 of this chapter."

§1625.13 Right of appeal following reopening of classification.

"Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification."

§1625.14 Cancellation of Order to Report for Induction or for Civilian Work by reopening of classification.

"The reopening of the classification of a registrant by the local board shall cancel any Order to Report for Induction (SSS Form No. 252) or Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply."

Title 32, Code of Federal Regulations

§1626.25 Special provisions when appeal involves claim that registrant is a conscientious objector.

"(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

"(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

"(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an injuiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification

of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant."

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 564

DAVID ARTHUR GEAREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the district court (Pet. App. 39a-50a) is reported at 260 F. Supp. 7 and the opinion of the court of appeals, vacating petitioner's conviction and remanding the case for further proceedings (Pet. App. 23a-36a) is reported at 368 F.2d 144. The opinion of the district court after remand (Pet. App 17a-20a) is reported at 266 F. Supp. 161 and the opinion of the court of appeals affirming peti-

tioner's conviction after remand (Pet. App. 1a-14a) is reported at 379 F. 2d 915.

JURISDICTION

The judgment of the court of appeals was entered July 3, 1967. By order of Mr. Justice Fortas, the time for filing a petition for a writ of certiorari was extended to and including September 1, 1967, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was an adequate evidentiary basis for the local board's decision that petitioner was not sincere in professing to be a conscientious objector.

2. Whether petitioner was improperly deprived of administrative review of the local board's decision.

3. Whether, at the special hearing conducted for the limited and specific purpose of determining the precise basis for the local board's decision, the district court committed reversible error in hearing only the testimony of the members of the board and not hearing testimony of petitioner concerning the interview conducted by the board prior to its decision refusing to reopen petitioner's classification.

STATUTES AND REGULATIONS INVOLVED

50 U.S.C. App. 456(j) provides in pertinent part:

> Nothing contained in this title * * * shall be constructed to require any person to be subject

> to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. * * *

50 U.S.C. (1964 ed.) App. 456(j), as it was written prior to July 1, 1967, further provided: [1]

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. * * *

50 U.S.C. App. 460(b) provides in pertinent part:

> The President is authorized—
>
> (1) to prescribe the necessary rules and regulations to carry out the provisions of this title * * * ;
>
> * * * *
>
> (3) * * * The decisions of [a] local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * *

Selective Service Regulation 1625.2, 32 C.F.R. 1625.2, provides in pertinent part:

> The local board may reopen and consider anew the classification of a registrant * * * provided

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[1] Effective July 1, 1967, all provisions relating to special administrative review for conscientious objector claimants have been deleted from the statute. See Public Law 90-40; 81 Stat. 100, June 30, 1967.

> * * * the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

STATEMENT

Petitioner, after waiving trial by jury, was tried and convicted in the United States District Court for the Southern District of New York under an indictment charging that he knowingly refused to submit to induction into the Armed Forces of the United States, in violation of 50 App. U.S.C. 462(a). On April 19, 1966, he was sentenced to imprisonment for a period of two years (Pet. App. 51a-52a).

1. In October 1960 petitioner, having reached the age of 18, registered with his local Selective Service board. In November 1961 he was classified by the board as available for military service (1-A) (Tr. 20-23),[2] but the board subsequently granted him a student deferment (2-S) because he was enrolled as a full-time student at St. Francis College in Brooklyn. In November 1964 the board, having learned that petitioner was no longer enrolled at St. Francis College but was taking only a three credit part-time course at another school, classified him as 1-A (Tr. 24; II

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[2] "Tr." refers to the transcript of the trial proceedings. "R." refers to the three-volume record containing the appellant's appendix in the first appeal, the government's appendix in the first appeal, and the transcript of the special hearing.

R. 3a). Later that month, the board ordered petitioner to report for a pre-induction physical examination, and petitioner complied with the order (Tr. 24). In early December 1964 petitioner advised the local board by letter that he was taking the three credit course to fulfill requirements for a B.A. degree which he expected to receive in January 1965, and that he intended to return to school full-time in February to begin work toward an M.A. degree (II R. 4a). In January the board notified petitioner that, upon review of his file, it had determined that the evidence submitted did not justify reconsideration of his 1-A classification, and that, as a result of his physical examination, he had been found acceptable for military service (Def. Ex. D; I R. 52a-53a, 96a). Petitioner wrote to the board in mid-January 1965 that he was in the process of registering in a school of cinematography and wished a hearing to discuss his status as a student (II R. 5a). The board granted the requested hearing on February 2, 1965. At the hearing, petitioner presented evidence that he was enrolled at a school of cinematography and claimed that he intended to re-register at St. Francis College. The board thereupon reclassified petitioner as 2-S and told him to have St. Francis forward proof of his enrollment (Gov. Ex. 4; II R. 18a-19a). In February 1965, the college informed the board that petitioner was "no longer in attendance" (II R. 7a). The board immediately mailed petitioner a request for evidence of his attendance. After six weeks passed without a reply, the board reclassified petitioner as

1-A and mailed him a notification of this classification and of his rights of personal appearance and appeal. No response was received from petitioner (Tr. 32-33).

On April 19, 1965, the board mailed petitioner an order to report for induction on May 5, 1965 (Gov. Ex. 6; Tr. 35). Four days later, on April 23, 1965, the board received a letter from petitioner stating that he was then in attendance at City College as well as the school of cinematography and requesting that his classification as a student be reconsidered and that his induction be postponed at least until the end of the spring term (Gov. Ex. 2; I R. 105a). On that same day, the local board mailed petitioner a request for certifications from the college and the school of cinematography (I R. 29a; II R. 8a), and discussed petitioner's request for a postponement in induction with the New York City Director of the Selective Service System (II R. 9a). The Director thereafter notified petitioner that his induction date would be postponed until July, in order to afford him "an opportunity to continue [his] studies and complete this term," and "recommended that in the future the Local Board be notified, in writing, within ten days after it occurs, of any * * * fact which might change [his] classification" (II R. 9a-11a). On May 10 the board received notice from City College that petitioner was enrolled there, but that he was taking only three credits (I R. 29a).

Two weeks later, on May 24, 1965, petitioner, for the first time, asked the board to send him the spe-

cial questionnaire for conscientious objectors in order that he might apply for such a classification (I R. 30a; II R. 12a). Petitioner's letter stated that he had been concerned with the problem for "the past several years", but that "[o]nce [he] had resolved the problem in [his] own mind, [he] refrained from notifying the board because [he] felt quite secure with [his] status as a student, and [he] thought that [he] would have plenty of time to inform [the board] after completion of school" (II R. 12a). The questionnaire was sent, completed by petitioner, and returned to the local board (Gov. Ex. 2; I R. 31a, 81a, 98a).[3] On June 17, 1965, the board invited petitioner to appear for an interview on July 6, and notified him that the date set for his induction was July 8 (I R. 31a-32a, 40a). On July 1 petitioner informed the board that he wished to change from "no" to "yes" his answer on the conscientious objector questionnaire as to whether he was a member of any religious organization, stating that he was a member of the Catholic Church (Def. Ex. B; I R. 94a). On

[3] In it petitioner stated, after two weeks of deliberating how to answer (I R. 58a), that he was a member of no religious sect or organization and that "as to the possible existence of * * * a 'Supreme Being' " his mind "at this time * * * can only raise questions." He explained, however, that "[b]eyond any possible relation with an above suggested 'Supreme Being' " he had a "feeling of empathy with the human predicament" which predicament he did not want to "maintain and magnify * * * through participation in war." He acknowledged that he had made "no public expression" of these views. (Gov. Ex. 2; I R. 81a, 98a-102a).

July 2, the board received a notice from the principal of Bishop Ford High School in New York City, stating that petitioner had been hired as a full-time English teacher beginning in June 1965 and that it would be "almost impossible at this late date to replace him," and requesting that petitioner be given a one year deferment (Def. Ex. A; I R. 38a-39a, 93a).

On July 6, 1965, the scheduled interview with petitioner was held by the four members of the local board. The minutes of the secretary of the board reflected (Gov. Ex. 9; I R. 34a-35a, 103a-104a):

> Registrant interviewed, had decided just recently to become a c.o., said he had been thinking about it but never mentioned it. We reviewed the c.o. form # 150, also reviewed letter sent by Bishop Ford High School. Registrant claims he is not working there nor that he would be definitely working there in September. Said he would like to go to Europe and take pictures since this is the vocation he wants to pursue or maybe teach when he returns. The Board after reviewing the evidence submitted and registrant's claims felt he did not qualify to be a genuine c.o. All facts considered did not warrant a change in classification. He was advised to report as scheduled. Vote was 4 to 0.

On July 8, 1965, petitioner reported to the induction station but refused to submit to induction. He told the officer in charge that he refused "primarily because he was anticipating employment with a high school in Brooklyn" and also because "he was in dis-

agreement with the foreign policy of the United States" and could not reconcile his belief or conscience with that policy. (I R. 41a-43a; II R. 1a-2a).

2. In its opinion finding petitioner guilty of refusing to submit to induction, the trial court pointed out that under 32 C.F.R. 1625.2 the local board was not empowered to reopen and reconsider petitioner's classification after mailing an order to report for induction unless it first specifically found there had been a change in his status resulting from circumstances over which he had no control. The court acknowledged that the development of the beliefs of a conscientious objector could constitute such a change in status, and observed that the board in this case did weigh petitioner's claim. The court noted, however, that the board apparently found that petitioner had not been a "genuine" conscientious objector either before or after the order to report for induction and "[i]n effect * * * found that there was no 'change in status' ". (Pet. App. 45a-48a). The court of appeals, however, found the board's language to be ambiguous. It therefore remanded the case for a hearing to determine whether the board had in fact found that petitioner never was a conscientious objector (or whether, if he was a conscientious objector, his views in this regard had matured before the induction notice was sent) and thus that there was no change in his status, or whether the board had improperly refused to reopen petitioner's classification simply because the claim was not advanced before the mailing of the induction notice (Pet. App. 31a-36a).

3. At the hearing after remand to the district court, three members of the local board [4] were examined and cross-examined extensively—their testimony covers 200 pages of transcript—concerning their conclusion that petitioner was not a "genuine" conscientious objector. All three testified that the purpose of the July interview was to ascertain whether petitioner was, in fact, a conscientious objector at that time, without regard to the fact that his induction order had been issued (III R. 5, 7, 9-10, 22, 39-41, 48, 65-68, 84, 87-88, 91, 148-149, 153-156). The board members stated that they had questioned petitioner at the interview for approximately half an hour (III R. 85, 136), trying to "get him to open up, to find out whether he was really a c.o. or not" (III R. 40-41). Petitioner's main concern at the interview, however, appeared to be the furthering of his education by going to Europe and making films (III R. 29, 32, 46, 75, 84, 88, 137, 149). The board considered, among other things, the fact that when asked about the teaching position he had reportedly accepted at Bishop Ford High School petitioner stated that he had decided not to take the job for personal reasons but declined to disclose what those reasons were (III R. 30-32, 42-43, 136-137, 141-142, 148-149). When asked about his religious affiliations, petitioner stated that he was following no religion, although five days earlier he had written the board that he was a member of the Catholic Church (III R. 54, 169-170). When asked what he would do if his family or girl friend were

[4] The fourth member could no longer recall either petitioner or the interview (III R. 78).

attacked, he informed the board, after some discussion, that he would "fight the attacker off," although six weeks earlier he had stated in the questionnaire that non-violent force would be the only kind he could consider (III R. 101, 104). The board members found petitioner to be "impatient" (III R. 150), "evasive" (III R. 41, 55, 150, 155-157), and "insincere" (III R. 41, 55, 86, 155-157). On the basis of the interview and the information in petitioner's file (III R. 34, 59, 74-75, 118, 139-140, 159, 184), the board decided that there had been no crystallization in petitioner's mind of the views of a conscientious objector, and concluded that "there was no change as to his circumstances" (III R. 37-39). The conviction was reinstated and the original two year sentence was reimposed (see Pet. App. 21a-22a). The court of appeals affirmed (Pet. App. 1a-14a).

ARGUMENT

Based upon the specific direction of the court of appeals, the district court in this case held a detailed hearing to determine the basis upon which the local board refused to reopen petitioner's 1-A classification. Following that hearing, the district court concluded that the board would have honored petitioner's request for reclassification as a conscientious objector, even though that request was made after the issuance of the induction notice, if it had found that the claim had a valid foundation, but that the board had a rational basis to conclude, as it did, that petitioner was "not then, and had never been a genuine

conscientious objector" (Pet. App. 19a). After reviewing the evidence, the court of appeals agreed that this was the basis of the board's decision and that the full record of the proceedings provided "more than ample evidence" for the board's substantive ruling (Pet. App. 11a). In these factual circumstances, there is no warrant for further review by this Court.

1. The evidence clearly demonstrates a rational basis for the board's decision that petitioner was not a conscientious objector—petitioner's requests for student deferments for varying purposes; his failure to express any views of conscientious objection until notified of his pending induction; his vacillations concerning his intent to teach, his religious affiliations, and his views on the use of defensive force; his principal concern at the interview with furthering his education by making films in Europe rather than with being reclassified as a conscientious objector; and his evasive responses to questions posed by the board. Given the board's opportunity to observe petitioner's demeanor, the totality of these factors fully justified the finding that petitioner was not sincere in his professed beliefs. See *United States* v. *Seeger*, 380 U.S. 163, 185; *Witmer* v. *United States*, 348 U.S. 375, 381-383; *Parrott* v. *United States*, 370 F.2d 388, 391-394 (C.A. 9), certiorari denied *sub nom. Lawrence* v. *United States*, 387 U.S. 908.

The record does not support petitioner's contention (Pet. 25-27) that the board reached its decision solely on basis of petitioner's acknowledged readiness to use force in the defense of his family. A reading of the

full testimony of the board members clearly demonstrates that petitioner's statements in this regard constituted only one of many factors leading to the conclusion that petitioner was insincere in his professed beliefs. While a willingness to use force in such a situation would admittedly not itself disqualify a registrant from conscientious objector classification, petitioner's statements at the interview, and his differing statement in the questionnaire, certainly were proper matters, among others, for the board's consideration.

2. Petitioner was not improperly denied administrative review of the local board's decision. Then, as now, 50 U.S.C. App. 456(j) provided for the exemption from combatant conscriptive service of persons conscientiously opposed to participation in war, and then, but not now, provided for a special administrative review of a local board's decision not to classify a registrant as a conscientious objector.[5] Selective Service Regulation 1625.2, 32 C.F.R. 1625.2, provides generally for reopening and reconsideration of a registrant's classification upon the presentation of new facts, but directs that after a registrant has been sent a notice of induction, his classification may not be reopened and reconsidered by the local board for any reason, "unless the local board first specifically finds there has been a change in the registrant's status re-

[5] All provisions relating to a special administrative review for conscientious objector claimants have since been deleted from the statute (Public Law 90-40; 81 Stat. 100, June 30, 1967).

sulting from circumstances over which the registrant had no control." Contrary to petitioner's contention, this does not conflict with the provisions of the statute, but provides a rational procedure. Courts of appeals have unanimously found the regulation to be a valid and reasonable means of preventing disruption of the selective service machinery by last minute assertion of pre-existing claims for deferment and have found it not to be in derogation of either the spirit or purpose of the statute exempting conscientious objectors. *Davis* v. *United States*, 374 F.2d 1, 4 (C.A. 5); *United States* v. *Al-Majied Muhammud*, 364 F.2d 223 (C.A. 4); *United States* v. *Taylor*, 351 F.2d 228, 230 (C.A. 6); *United States* v. *Beaver*, 309 F.2d 273, 276 (C.A. 4), certiorari denied, 371 U.S. 951; *Boyd* v. *United States*, 269 F.2d 607, 611 (C.A. 9); *Keene* v. *United States*, 266 F.2d 378, 383-384 (C.A. 10); cf. *Parrott* v. *United States*, 370 F.2d 388, 394 (C.A. 9), certiorari denied *sub nom. Lawrence* v. *United States*, 387 U.S. 908. Similarly, the legitimate interest in prompt mobilization need not be thwarted by automatic administrative review of frivolous claims.[6]

This is not a case where no consideration was given to petitioner's post-notice claim. The court below

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[6] In its second opinion following the hearing, the district court concluded as an alternative basis for upholding the order of the local board that if petitioner had any conscientious objection claims, they had in fact matured prior to the issuance of the induction notice (Pet. App. 20a). However, as the court of appeals pointed out, since the local board on ample evidence had determined that petitioner's claim was never genuine "it would be labor in vain to require the Board to determine when the claim matured" (Pet. App. 8a-9a).

held that a post-notice crystallization of conscientious objections to military service could constitute a change in status under the regulation, and consequently that, if such a change in status were found to have occurred, a board could reconsider a registrant's classification. This was the approach taken by the local board in this case. Since, however, the board here found "there was no change as to [petitioner's] circumstances" (III R. 37-39), there was no reason to reopen and reconsider his classification. This preliminary finding was not itself appealable under the special statutory appeal provisions or otherwise. *United States* v. *Beaver*, 309 F.2d 273, 277 (C.A. 4), certiorari denied, 371 U.S. 951; *Boyd* v. *United States*, 269 F.2d 607, 611 (C.A. 9).[7]

Petitioner's argument that upon a registrant's presentation of a non-frivolous claim the board is required to reopen and reconsider his classification and thereby provide him with a right to appeal, is based

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[7] There is no merit to petitioner's related argument that where administrative review is not provided, judicial review should be broader than the traditional "rational basis" rule. 50 U.S.C. App. 460(b)(3) specifically provides that local board decisions shall be final, except where an administrative appeal is authorized and is taken in accordance with such regulations as may be prescribed. Thus where the regulations do not provide for an administrative appeal, as is the case regarding a decision of the nature here involved, Congress has imbued local board decisions with the same finality for extra-administrative purposes as those sustained by an appeal board. See generally, *Estep* v. *United States*, 327 U.S. 114. Moreover, even if broader judicial review standards were applicable there would be no occasion to disapprove the boards' finding on the facts as presented in this case.

upon regulations and cases dealing with the procedure *before* notice of induction is sent (Pet. 19-22). As noted above, after notice of induction is sent, Selective Service Regulation 1625.2, 32 C.F.R. 1625.2 prohibits the board from so acting unless it first specifically finds a change in the registrant's status. In the sole case cited by petitioner involving a claim made after notice of induction, the claim was timely (within ten days of the occurrence) and demonstrated a clear change in status (admittance to a recognized theological school); and the court held only that "[t]he local board should have given consideration to [the registrant's] change of status and determined whether it required his reclassification." *United States* v. *Craig*, 207 F.2d 888, 891 (C.A. 3). Moreover, contrary to petitioner's argument, a mere mailing by a local board of a conscientious objector questionnaire is plainly not a reopening of petitioner's classification, but only a compliance with Selective Service Regulation 1621.11, 32 C.F.R. 1621.11. *United States* v. *Beaver*, 309 F.2d 273, 277 (C.A. 4), certiorari denied, 371 U.S. 951; *Boyd* v. *United States*, 269 F.2d 607, 609-610 (C.A. 9).[8]

3. There is no substance to petitioner's contention that the district court committed reversible error in declining to permit him to testify at the special hearing on remand of the case. At the trial itself, of

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[8] There is no merit to petitioner's further argument that the board rejected his claim because of its lateness (Pet. 8, 10, 25); the court of appeals found the evidence to the contrary "overwhelming" (Pet. App. 7a-8a).

course, petitioner had a right to testify in his own defense, and he did so testify. The special hearing, however, was limited to the purpose of determining the precise basis for the local board's decision—whether it had considered and rejected petitioner's claim to conscientious objector status, or whether it refused even to consider the claim because it was first raised after notice of induction. To make this determination, the district court properly heard the testimony of the board members themselves—the only persons familiar with their deliberations. Petitioner's proposed testimony as to his memory of the interview preceding the deliberations was not pertinent to that limited issue. In any event, the acknowledged purpose of petitioner's counsel in calling petitioner as a witness at the hearing was to permit introduction of a three-page memorandum (Tr. 10-12) which petitioner had prepared as his recollection of the interview (Tr. 55-56, 194-197). Substantial portions of the memorandum had previously been read into the record by counsel in cross-examining the board members (Tr. 51-63, 99-100, 103-107, 110-115, 117, 120, 178-183, 185-186, 188-190), and the memorandum was considered by the court below (Pet. App. 14a) and found to support the government's position rather than petitioner's.[9]

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[9] Petitioner also complains that the government counsel was permitted to ask leading questions at the hearing (Pet. 29-30). The questions, however, were not leading; none suggested answers not within the witness's recollection. In any event, the hearing was not before a jury, and control of the phrasing of questions was a matter for the district court's

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

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OCTOBER 1967

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discretion. See 3 Wigmore, *Evidence*, §§ 769, 770, 772 (3rd ed., 1940); 3 Wharton, *Criminal Evidence*, §§ 846, 847 (12th ed., 1955).

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 564

DAVID ARTHUR GEAREY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 564

DAVID ARTHUR GEAREY,

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—v.—

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Respondent.

PETITIONER'S REPLY BRIEF

1. The Government's brief in opposition to certiorari seeks to obscure the existence of a three-way conflict in the Circuits concerning the procedural rights available to a Selective Service registrant who claims conscientious objector classification after an order to report, but before induction. The three prevailing and conflicting standards are as follows:

(a) The *Underwood*[1] rule applied uniformly in the Third Circuit: registrant entitled to full procedural rights including reopening, personal appearance, and appeal, if claim made at any time prior to induction.

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[1] Citations on pp. 14-15 of Petition.

(b) The *Boyd*[2] rule, which is followed in the Ninth and other Circuits: a post-order to report claim will not be recognized.

(c) The *Gearey* rule, announced by the Second Circuit in this case: a post-order to report claim cannot be denied exclusively because of lateness, but the registrant making such a claim has no procedural rights whatsoever beyond the right to have his late claim "considered" by the local board.

The *Gearey* case indeed laid down a "new guideline" to be followed in the Second Circuit. See *United States* v. *Fargas*, 267 F. Supp. 452, 456 (S. D. N. Y. 1967). Petitioner argues that the guideline is insufficient since there can be no realization of the substantive rights granted without the corresponding procedural guarantees. Therefore, petitioner urges that the Third Circuit rule should be adopted.

But the Government seems to argue that there is no difference between the *Gearey* rule and the *Boyd* rule. Brief in Opposition, p. 14. That this argument is untenable is evident from the very words of the decisions cited on page 14 of the brief in opposition.[3]

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[2] Citations in Government's Brief in Opposition, p. 14. The Court below in *Gearey I* recognized that it was ruling contrary to certain other Circuits. 368 F. 2d at 150, fn. 13, Petition, App., p. 33a.

[3] Most of the cases cited by the Government as supporting *Gearey* are indeed repudiated by *Gearey*. ". . . no request for reopening and reclassification shall be entertained after notice to report for induction is mailed." *Keene* v. *United States*, 266 F. 2d 378, 384 (10th Cir. 1959); ". . . a claim of conscientious objector status must be made before the individual concerned has been notified to report for induction." *United States* v. *Taylor*, 351 F. 2d 228, 236 (6th Cir. 1965); "Belated development of conscientious objection is not a change in status beyond the control of registrant."; *Davis* v. *United States*, 374 F. 2d 1, 4 (5th Cir. 1967);

The Government's effort to force the *Gearey* case into the *Boyd* mold is unpersuasive. There is in fact a three-way conflict. In addition, several of the Circuits have not yet announced a rule. Particularly in the light of the frequently recurring event of registrants from one state being ordered to report for induction in another, the absence of a uniform national rule creates a question of considerable public importance which only this Court can resolve.

2. The brief in opposition contends that there is no merit to petitioner's argument that where administrative review is not provided, judicial review should be broader than the traditional "rational basis in fact" standard. Page 15, footnote 7. That there is indeed merit to this argument is demonstrated by the first reported decision in the Second Circuit which sought to apply *Gearey*. Judge Bryan of the Southern District of New York, in *United States* v. *Fargas*, *supra*, analyzing the impact of the *Gearey* rule, held:

> "In order to determine the validity of the defense which Fargas now seeks to raise, it will be necessary to explore fully all of the facts and circumstances bearing on the board's action to determine whether such action as the board has already taken has a basis in fact when measured by the new guideline laid down in Gearey." 267 F. Supp. at 456.[4]

"Belated development of conscientious objection is not such a change in status beyond the control of a registrant." *United States* v. *Muhammad*, 364 F. 2d 223, 224 (4th Cir. 1966). Furthermore, the Ninth Circuit, in a post-Gearey case cited by the Government, *Parrott* v. *United States*, 370 F. 2d 388, 395 (1966), cert. den. sub nom., *Lawrence* v. *United States*, 387 U. S. 908 has in turn repudiated *Gearey*. Thus, the inter-Circuit conflict can hardly be clearer.

[4] The restatement of the traditional rational basis in fact rule by this Court in *United States* v. *Seeger*, 380 U. S. 163, 185 (1965)

3. The brief in opposition (p. 16) seeks to distinguish *United States ex rel. Berman* v. *Craig*, 207 F. 2d 888 (3d Cir. 1953) which stands for the proposition that the presentation of a non-frivolous claim, even after an order to report for induction, compels reopening and reconsideration, and consequently, the accompanying procedural rights. The Government thereby appears to concede that the Court below erred in its broad statement that none of the cases cited to it below supported this view. See Petition, p. 21, footnote 32. The Government admits that the *Berman* case stands for the proposition asserted by petitioner, but then tries to distinguish it. The distinction fails because petitioner's claim herein was just as timely as Berman's; and according to the very holding of the Court below, a change in status by reason of post-induction maturation of conscientious objector views is just as much a change in status as that caused by admittance to a recognized theological school.

4. The lengthy statement of the case in the brief in opposition contains a number of inaccurate statements. It is probably not appropriate to use a reply brief to respond to each and every one of the extracontextual allegations

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was linked to a recitation of the procedural rights available to conscientious objector registrants. This petition should be granted to determine whether or not a late registrant such as petitioner, is to be denied the rights which this Court reiterated in 1965—the last time it has spoken on conscientious objection—as being available to conscientious objectors generally.

Moreover, a recent and as yet unreported decision of the Ninth Circuit, *Wills* v. *United States*, —— F. 2d ——, No. 21378, Oct. 3, 1967, has held that as a "consequence" of a registrant losing "the opportunity to secure administrative review of his constitutional claim", he was entitled to judicial review on the merits, *Wills* v. *United States*, Pet. for Cert., p. A-6.

recited as "fact" in the Government's statement of the case. However, a few of these will be noted in the margin.[5]

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[5] (a) It is stated (Brief in Opp., pp. 8-9) that petitioner told the officer in charge of the induction station that his refusal to submit to induction was because of pending employment as a teacher and disagreement with foreign policy, and thereby clearly implied that the petitioner stated nothing about conscientious objection at this crucial moment. Yet the record shows that the officer in charge admitted on cross-examination that there was considerable discussion between him and petitioner about conscientious objection. I R. 41a-43a, 46a. Moreover, the FBI agent who arrested petitioner at the induction station testified that at the time of the arrest "he told me the reason for this was an inner conviction of his that he could not take the life of another man." I R. 45a.

(b) It is stated (p. 10) that petitioner refused to answer certain questions for "personal reasons". It is true that Board Member Hatterschied so testified at the hearing. But Chairman Barbiere did not recall any such refusal, III R. 120; and Member Elmezzi testified that he answered all questions, and did not recall any refusal, III R. 189. Petitioner was not permitted to testify at the hearing, and he was therefore unable to attempt to rebut this attack on his sincerity. See Petition, pp. 28-30.

(c) It is implied (p. 10) that petitioner's insincerity was manifested in his stating to the Board, in response to a question about his religion, that he followed no religion, after having previously written the Board a letter stating that he was a Catholic. But, in that same letter, petitioner had explained that while he was committed to "the spirit and teachings" he was not in agreement with all the "external formulae" of Catholicism. I R. 94a. Moreover, the Board Chairman testified explicitly that no members of the Board asked petitioner any questions about his religious affiliation. III R. 110.

(d) It is stated (p. 11) that the Board "decided that there has been no crystallization". No Board member used either the word "crystallization", or any reasonable synonym thereof. Indeed, in response to direct questions, all three testified that there was no discussion whatsoever of this concept. III R. 27, 28, 34, 36, 39, 46, 49 (Hatterschied testimony); 106, 107, 125, 126, 131, 134 (Barbiere testimony); 175, 176 (Elmezzi testimony).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 564

DAVID ARTHUR GEAREY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 564

DAVID ARTHUR GEAREY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pursuant to Rule 58(2) of the Rules of this Court, petitioner respectfully prays for a rehearing of the order denying the petition for a writ of certiorari previously filed. On November 13, 1967, the Court entered an order denying such petition. The order stated that Mr. Justice Douglas was of the opinion that certiorari should be granted.

Rehearing is sought on the grounds of intervening circumstances of substantial effect which may very well be sufficient to persuade additional Justices of this Court to vote to grant the petition.

The intervening circumstances of substantial effect relate to Point I of the petition (pp. 13 to 18), and to Paragraph 1 of petitioner's reply brief (pp. 1 to 3). It was contended

that certiorari should be granted because of an apparent three-way conflict between the circuits concerning the procedural rights available to a selective service registrant who claims conscientious objector classification after an order to report, but before induction. It was pointed out that the *Underwood*[1] rule, which petitioner argued should be made uniformly applicable, was sharply in contrast with the *Gearey* rule announced by the Second Circuit in this case. Although *Underwood* was a decision of a district court, petitioner argued that it was applied in district courts throughout the Third Circuit, and there was no contrary decision anywhere in the Third Circuit.

The elevation, by prosecutorial understanding and usage, of the *Underwood* decision to the status of a Third Circuit-wide precedent, has, since the filing of the petition, been revealed to petitioner's counsel in another case. This strongly emphasizes the sharp divergence between the Second and Third Circuits to such an extent that it might well warrant granting this petition for rehearing.

Petitioner's counsel respectfully advise the Court that they were retained in another case involving a conscientious objector applicant in the State of New Jersey who sought to file his claim after receiving an order to report for induction, but prior to induction, similar to petitioner. The name of this selective service registrant is Geoffrey Bidgood Montagu.[2] Mr. Montagu was allowed to file his form with his local board, but was denied reopening, personal appearance and corresponding administrative appellate rights. When he refused to report for induction as

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[1] *United States* v. *Underwood*, 151 F. Supp. 874 (E. D. Pa. 1955).

[2] The events of this case are disclosed with Mr. Montagu's express permission.

ordered, the case was reported to the United States Attorney for the District of New Jersey for prosecution. The office of the United States Attorney expressly declined to prosecute on the grounds that under the *Underwood* case the registrant was entitled to all of the procedural rights which he was denied by the board's refusal to reopen. A copy of the letter from the office of the United States Attorney to petitioner's counsel is set forth as Appendix A to this petition.

It is clear that petitioner herein, who resides in New York, in the Second Circuit, has been denied exactly those procedural rights which the United States Attorney for the District of New Jersey recognizes as the entitlement of similarly situated conscientious objector claimants in the State of New Jersey and throughout the Third Circuit.

Petitioner is not alleging a mere speculative difference in treatment to be gleaned from appellate decisions in two circuits. There is revealed in Appendix A irrebuttable evidence that the different rules of the Second and Third Circuits lead to substantial and controlling distinctions in the treatment of selective service registrants. Under the existing situation, under the same federal law, a conscientious objector applicant in New York is convicted and sent to jail where under identical circumstances he would not be prosecuted if he were across the Hudson River in New Jersey.

Certiorari should be granted to declare a uniform rule and remedy this manifest injustice.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the petition for rehearing be granted, that this Court vacate its prior order denying the petition for writ of certiorari, and grant the same, and for such other and further relief as may be just.

Respectfully submitted,

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RHODA H. KARPATKIN
Attorneys for Petitioner

MELVIN L. WULF
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Of Counsel

Certificate of Counsel Under Rule 58

I, MARVIN M. KARPATKIN, counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that such petition is restricted to the grounds specified in Rule 58 of the Rules of this Court.

MARVIN M. KARPATKIN

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
FOR THE DISTRICT OF NEW JERSEY
NEWARK 1, NEW JERSEY

WHM:rsd, M50-1530

October 27, 1967

Marvin Karpatkin, Esquire
660 Madison Avenue
New York, New York 10021

Re: Geoffrey Bidgood Montagu—SSN 28 29 42 811

Dear Mr. Karpatkin:

Reference is made to the telephone conversation between you and the undersigned on today's date.

Please be advised that this office has written Local Board 29 with regard to the subject, and advised them that it is our opinion that the decision of *U. S.* v. *Underwood,* 151 F.Supp. 874 (1955), which construes Section 6(j) of the Universal Military Training and Service Act of 1950, 50 U.S.C. App. 456(j), requires that Mr. Montagu be provided with a reclassification hearing. We further advised the Board that this office will take no prosecutive action unless and until the procedural matters as aforementioned are completed.

Very truly yours,

DAVID M. SATZ, JR.
United States Attorney

WILBUR H. MATHESIUS
By: Wilbur H. Mathesius
Assistant United States Attorney